TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted] 181.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

FRED WASS AND PAULINE WASS, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED MARCH 29, 1909.

(21,570.)

(21,570.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 397.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

FRED WASS AND PAULINE WASS, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 27, 1909.

1 UNITED STATES OF AMERICA,
State of Minnesota:

To the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota:

The petition of the Northern Pacific Railway Company respectfully shows that on the 7th day of October, 1908, the Supreme Court of the State of Minnesota rendered a final decree against your petitioner in a certain cause, wherein your petitioner, the Northern Pacific Railway Company, was plaintiff and Fred Wass and Pauline Wass were defendants, affirming the judgment of the District Court for Todd County, Minnesota, as will appear by reference to the record and proceedings in said cause; and that said Supreme Court of Minnesota is the highest court of said state in which a decision in said suit can be had.

Your petitioner claims the right to remove said decree to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States for the reason that there was drawn in question in said cause the validity of a statute or an authority exercised under the United States and the decision was against its validity, and that a manifest error hath intervened to the great damage of said Northern Pacific Railway Company, as appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore, your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States.

NORTHERN PACIFIC RAILWAY COMPANY, *Petitioner.*
CHARLES W. BUNN,
Attorney for Petitioner.

Let the Writ of Error issue as prayed.

CHARLES M. START,
Chief Justice of the Supreme Court of Minnesota.

Dated February 26th, 1909.

2 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Petition for writ of error in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 15th day of March, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

3 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court of the State of Minnesota before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in a suit between the Northern Pacific Railway Company, plaintiff and Fred Wass and Pauline Wass, his wife, defendants, said suit being there entitled "Northern Pacific Railway Company, plaintiff and appellant, vs. Fred Wass and Pauline Wass, his wife, defendants and respondents," wherein was drawn in question the validity of a statute — or an authority exercised under the United States, and the decision was against its validity, a manifest error hath intervened to the great damage of said Northern Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

4 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 26th day of February in the year of our Lord one thousand nine hundred and nine.

[U. S. Circuit Court Seal, District of Minnesota, Third Division.]

HENRY D. LANG,
Clerk of Circuit Court of United States for District of Minnesota.
By LOUISE B. TROTT,
Deputy.

The above writ is hereby allowed.
CHAS. M. START,
Chief Justice of Supreme Court of Minnesota.

5 [Endorsed:] Filed Mar. 1, 1909. C. A. Pidgeon, Clerk.

6 THE UNITED STATES OF AMERICA, ss:

To Fred Wass and Pauline Wass, his wife, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Minne-

sota, wherein the Northern Pacific Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota, this 26th day of February, in the year of our Lord one thousand nine hundred and nine.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

Service of the above citation is admitted this 27 day of February, 1909.

P. B. GORMAN,
Attorney for Defendants.

7 STATE OF MINNESOTA:

Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
FRED WASS and PAULINE WASS, His Wife, Defendants in Error.

Know all men by these presents, that we, the Northern Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, as principal, and the National Surety Company, a corporation organized and existing under the laws of the State of New York, as surety, are held and firmly bound unto Fred Wass and Pauline Wass, his wife, in the full and just sum of two-hundred and fifty dollars ($250.00), to be paid to said Fred Wass and Pauline Wass, their heirs, executors or assigns, for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of February, in the year of our Lord one-thousand nine-hundred and nine.

Whereas lately in the Supreme Court of the State of Minnesota in a suit pending in said court between the Northern Pacific Railway Company, plaintiff, and Fred Wass and Pauline Wass, his wife, defendants, said suit being there entitled "Northern Pacific Railway Company, Plaintiff and Appellant, vs. Fred Wass and Pauline
8 Wass, his wife, Defendants and Respondents," judgment was rendered against the said plaintiff, Northern Pacific Railway Company, and the said plaintiff having obtained a writ of error and filed a copy thereof in the office of the Clerk of said Supreme Court of Minnesota, to reverse the judgment in the aforesaid suit, and a citation directed to the said Fred Wass and Pauline Wass, citing and admonishing them to be and appear at the Supreme Court of the United States at the city of Washington on or before the 27th day of March 1909;

Now, the condition of the above obligation is such that if the said

Northern Pacific Railway Company shall prosecute the said writ of error to effect and answer all damages and costs, if it shall fail to make its plea good, then this obligation to be void; otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
By CHARLES W. BUNN, *Its Attorney.*

[National Surety Co. Seal.]

NATIONAL SURETY COMPANY,
By A. M. BEND, *Its Attorney in Fact.*

E. B. McANDY.
L. H. GREEN.

9 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 25th day of February, 1909, before me personally appeared C. M. Bend, Attorney in Fact of the National Surety Company, the above named corporation, with whom I am personally acquainted, who, being by me duly sworn, said: That he is Attorney in Fact of said corporation, the National Surety Company, that he knows the corporate seal, that it was affixed by order of the board of directors of said corporation, and that he signed said instrument as Attorney in Fact of said corporation by like authority and the said C. M. Bend acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] R. H. MARTIN,
Notary Public, Ramsey County, Minnesota.

My Commission expires July 12, 1914.

Approved by:

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

10 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the bond on appeal and approval thereon in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 15th day of March, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

11 STATE OF MINNESOTA:

Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
FRED WASS and PAULINE WASS, His Wife, Defendants in Error

Assignments of Error.

Now comes the plaintiff in error, Northern Pacific Railway Company, and says that in the judgment of the Supreme Court of Minnesota herein there is manifest error as follows, to-wit: The court erred

1. In holding that the approval of the railway company's selection by the Secretary of the Interior was without authority and void, and that the Secretary had no discretion in the premises but was legally bound to approve the homestead application of the defendant in error.

2. In adjudging that the plaintiff in error holds its title under the patent of the United States as trustee for the defendant in error, and in decreeing that the plaintiff in error convey accordingly.

NORTHERN PACIFIC RAILWAY COMPANY.
By CHARLES W. BUNN, *Its Attorney.*

12 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the assignments of error in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 15th day of March, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

13 STATE OF MINNESOTA:

Supreme Court, April Term, 1908.

State of Minnesota, District Court, County of Todd, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
FRED WASS and PAULINE WASS, His Wife, Defendants.

Complaint.

The plaintiff herein, for cause of action against the above named defendants, respectfully shows unto the court:

I.

That the plaintiff, Northern Pacific Railway Company, is a corporation organized and existing under the laws of the State of Wisconsin.

14 II.

That plaintiff is the owner of the southeast quarter of section thirteen (13) in township one hundred and twenty-nine (129) north of range thirty-two (32) west, situate in the County of Todd, and State of Minnesota, and is entitled to the possession of said premises.

III.

That the defendants wrongfully withheld the possession of said premises from this plaintiff, and although the plaintiff has demanded of the defendants that they deliver to plaintiff the possession of said premises, the defendants refuse so to do.

IV.

That the value of the rents, issues and profits of said premises is the sum of one hundred ($100.00) dollars per year.

Wherefore, Plaintiff prays judgment against said defendants (1) for the recovery of the said described premises; (2) for the sum of one hundred ($100.00) dollars per year from June 2, 1905 to the date when said premises shall be restored to the possession of the plaintiff; and (3) for its costs and disbursements in this action.

C. W. BUNN,
M. T. SANDERS,
Attorneys for Plaintiff.

(Verified.)

15 *Answer.*

(Title of Cause.)

For answer to the plaintiff's complaint in the above entitled cause the defendant, Fred Wass, denies each and every allegation, matter and thing in said complaint contained, except as is hereinafter qualified or admitted.

1. Further answering said complaint, this defendant, Fred Wass, further alleges and shows to this Court that the St. Paul and Northern Pacific Railway Company is a corporation created and existing under and by virtue of the laws of the State of Minnesota, and that this defendant, Fred Wass, is a citizen of the United States and of the State of Minnesota, residing in the County of Todd and State of Minnesota.

2. That at the dates hereinafter mentioned the southeast quarter of section thirteen (13) township one hundred twenty-nine (129) north of range thirty-two (32) west of the fifth (5) principal meridian St. Cloud, Minnesota Land District, were surveyed public lands of the United States, lying and being in the County of Todd and State of Minnesota, and being within the twenty miles indemnity

limits of the grants made to the Territory of Minnesota by
16 act of Congress approved March 3, 1857 (11 Stat. 195) for
the purpose of aiding in the construction of railroads from Stillwater, by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the legislature of said territory may determine, also within the indemnity limits of the grant made to the State of Minnesota for the same purpose by the act of Congress approved March 3, 1865 (13 Stat. 526) as amended by the act of Congress approved March 3, 1871 (16 Stat. 588.)

All the right, title and interest of the State of Minnesota in and to said grants and to the lands described or included therein were conferred by the act of the legislature of said State of Minnesota dated March 1, 1877, on the Western Railway Company of Minnesota and subsequently by said Western Railway Company assigned and transferred to the St. Paul and Northern Pacific Railway Company.

3. On the 31st day of December, 1877, said Western Railway Company, the then transferee and beneficiary of and under each of said grants, filed in the United States Land Office at St. Cloud, Minnesota, a list of lands including the tract above described,
17 which purported to be a list of selections under the indemnity
provisions of its grants, but neither said list nor any paper accompanying it designated any lands within the primary limits of either of said grants as having been lost to the company so as to become the basis for the selected tracts.

On Dec. 4, 1889, the St. Paul and Northern Pacific Railway Company, the successor in interest of the said Western Railway Company, filed in the St. Cloud Land Office an amended selection list of indemnity lands including among others the tracts particularly described in paragraph two (2) of this Bill of Complaint, and February 12, 1892, said company also filed in said Land Office a rearranged list of indemnity selections, also containing reference to said described lands and for the first time designated therein a basis for each tract so selected. None of said selection lists was approved by the Secretary of the Interior, as required by law, and each and all thereof were illegal and without valid force or effect.

4. Said described tracts of land are also within the indemnity limits of the grant to the Northern Pacific Railway Company under the provisions of the act of Congress approved July 2, 1864 (13 Stat. 365) and were included in a withdrawal of indemnity lands made by the Secretary of the Interior,
18 Dec. 26, 1871 for the benefit of said company, said with-
drawal was not authorized by law and was revoked by the acting Commissioner of the General Land Office with the approval of the acting Secretary of the Interior, Sept. 6, 1887 (6 L. D. 131). No selection of the described tracts of land or any of them was ever made under the provisions of the grant to the Northern Pacific Railway Company, and no right in said company or any transferee claiming under it has attached to said lands or any thereof.

5. That in the month of April, 1899, this defendant, being then, as now, a citizen of the United States and a resident of the State of

Minnesota, over twenty-one (21) years of age, the head of a family, not the proprietor of more than one hundred sixty (160) acres of land in any state or territory, and otherwise in all respects qualified to become a homestead claimant under the laws of the United States entered upon, took possession of and made a settlement on the lots of land above described, with the bona fide intention of entering the same under the said homestead laws, said lands being at that time vacant public lands of the United Statss subject to such entry and settlement, and ever since said date he, this defendant, has
19 maintained his said possession and use of said tracts as a homestead, and has resided thereon and used the same as his only home, and has cultivated said lands each year, and has otherwise improved the same. That the improvements made and placed upon said lands are of the reasonable value of twelve hundred ($1,200.00) dollars, and the tracts of land themselves in their improved state are of a value in excess of twenty-five hundred ($2,500.00) dollars.

6. On the 4th day of December, 1899, this defendant, being then, as now, a qualified homestead claimant, as aforesaid, presented to and filed with the Register and Receiver of the United States Land District of St. Cloud, in the State of Minnesota, within which land district said lands are situated, a proper and legal application to enter said lands under the homestead laws of the United States, the same being then and there subject to such entry and accompanied such application by all the required proofs of his qualifications and actions as a homestead claimant, and at the same time tendered to the Receiver of said land district the lawful fees and commissions properly chargeable upon the allowance of such application. But said Register and Receiver, having received and filed said applica tion, did on the same day reject the same and refuse to receive
20 the fees and commissions tendered by this applicant, basing such rejection and refusal upon the sole ground that the lands applied for were embraced in a then pending, though unapproved indemnity selection of the said St. Paul and Northern Pacific Railway Company.

From such rejection and refusal this defendant appealed to the Commissioner of the General Land Office.

On July 10, 1903, the Commissioner of the General Land Office affirmed the decision of the local land officers of the St. Cloud District, rejecting the application of this defendant, filed as above stated, on Dec. 4, 1899, for the reason as stated by him that such application conflicted with the prior indemnity selection of the land by the St. Paul and Northern Pacific Railway Company. From this decision of the Commissioner this defendant appealed to the Secretary of the Interior and on Jan. 9, 1904, the Secretary of the Interior affirmed said decision of the Commissioner on the ground that the indemnity selection of said lands by said St. Paul and Northern Pacific Railway Company and its predecessor, the Western Railway Company of Minnesota, were valid and of record prior to the date of the alleged settlement and filing of homestead application
21 by this defendant. No other grounds for the rejection of the homestead application of this defendant was given. Neither

his qualifications as a homestead claimant nor the sufficiency of his residence on the land, nor the value of the improvements placed thereon by him was passed upon or questioned by any of said officers of the Land Department.

7. The Secretary of the Interior on Feb. 16, 1905, for the first time approved the list of indemnity selections made by the St. Paul and Northern Pacific Railway Company referred to hereinbefore. Prior to said approval the Secretary of the Interior had not in any way authorized or approved the selection of the lands hereinbefore described, by the St. Paul and Northern Pacific Railway Company, or its predecessor, the Western Railway Company of Minnesota, under the grants aforesaid.

8. Following such action of approval a patent of the United States for said lands was, on March 15, 1905, issued to the State of Minnesota describing the same as indemnity lands under the grants of March 3, 1857, March 3, 1865 and March 3, 1871, hereinbefore referred to, for the use and benefit of the railway company legally entitled to the same, and thereafter said patent was delivered to the Governor of the State of Minnesota as the agent of said state.

22 All estate, title and interest of the State of Minnesota in and to any and all lands falling within the provisions of the granting acts aforesaid having been duly conferred on the Western Railway Company of Minnesota, under and by virtue of the provisions of the act of the legislature of Minnesota, dated March 1, 1877, as above stated, and by an assignment by said railroad company transferred to the St. Paul and Northern Pacific Railway Company, the legal title to said lands under the patent in question devolved upon and became vested in said last named company, and its successor in interest, the Northern Pacific Railway Company.

9. Owing to and by reason of the actions of said Register and Receiver and of the Commissioner of the General Land Office and of the Secretary of the Interior, based upon a misconstruction and misinterpretation of the statutes of the United States as aforesaid, this defendant has been deprived illegally and unjustly of his right and claim to said land and of all opportunity to perfect his claim to the same under the homestead laws of the United States. Prior to the issuance of said patent to the State of Minnesota he had complied with all the requirements of said homestead laws and

23 had thereby become entitled to have a patent for said lands from the United States issued to him in accordance with the provisions of Section 2289 and following sections of the Revised Statutes of the United States, as amended by the Congress of the United States.

Wherefore, defendant asks judgment against plaintiff as follows:

1. That plaintiff's prayer and demand in the foregoing action be refused, rejected, overruled and denied, and that said St. Paul and Northern Pacific Railway Company, its successors in interest, the Northern Pacific Railway Company, be held trustee of the legal title to said lands for the use and benefit of this defendant.

2. That said St. Paul and Northern Pacific Railway Company, and its successors in interest, the Northern Pacific Railway Com-

pany, be required by the decree and order of this Court to convey the fee simple title to said lands to this defendant for his own use and benefit by proper deeds of conveyance.

That this defendant have judgment against said plaintiff for his costs and disbursements herein, and for such other and further relief as the equity of the case may require, and as to this Court may seem right, just and proper.

P. B. GORMAN,
Attorney for Defendant, St. Cloud, Minn.

(Verified.)

24 *Demurrer to Answer.*

(Title of Cause.)

Now comes the above named plaintiff and demurs to the answer of the defendants herein, for the reason that said answer does not state facts sufficient to constitute a defense or a counterclaim.

C. W. BUNN,
M. T. SANDERS,
Plaintiff's Attorneys, 211 Northern Pacific Railway Bldg., St. Paul, Minnesota.

Dated Oct. 25, 1907.

Order Overruling Demurrer.

(Title of Cause.)

The plaintiff in the above entitled action having duly demurred to the answer of the defendants therein, and said demurrer having duly come on for hearing before the Court, and having been duly argued and submitted, M. T. Sanders, Esq., appearing as attorney for the plaintiff in support of said demurrer, and P. B. Gor-
25 man, Esq., appearing as attorney for the defendants in opposition thereto, and the same having been duly considered by the Court:

It is Ordered, that said demurrer be and the same hereby is overruled.

Dated St. Cloud, Minnesota, January 18, 1908.

By the Court:

M. D. TAYLOR,
District Judge.

NOTE.—Railroad indemnity lands. December 31, 1877, the company filed a selection list including the lands in controversy. December 4, 1889, it filed an amended selection list. February 12, 1892, it filed a rearranged selection list. No approval of any of these lists was made by the Secretary of the Interior until February 16, 1905, after which the lands were patented to plaintiff.

Defendant, a duly qualified home-steader, settled upon the land in controversy in 1899 and ever since has resided upon and culti-

vated the same, and now has improvements thereon of the value of $1,200.00. In 1899 he duly applied to make homestead entry of the land, but his application was rejected by the local land
26 office on account of these railroad selections. He appealed to the Commissioner of the General Land Office who also rejected his application for the same reason. He appealed to the Secretary of the Interior who again rejected his application on the same ground.

Defendant has complied with the homestead law and is entitled to the land unless these unapproved selection lists segregated it from the public domain so that it was not subject to homestead entry. What is the effect of such lists before they are approved by the Secretary? Do they bar settlers from acquiring homestead rights? Is such a list a mere proposal to take such lands as indemnity and of no effect until approved by the Secretary, or does the company by filing it remove all the lands included therein from the operation of the public land laws without such approval? If the latter rule obtains, the company, of its own volition, may tie up the entire mass of lands out of which indemnity may be selected, for an indefinite period (in this case nearly thirty years) and until the Secretary shall approve or disapprove the proposed selection.

In Sjoli v. Dreschel, 199 U. S. 564, 50 L. Ed. 311, the court say that from the numerous cases in that court the following propositions are deduced:

27 "That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the preemption and homestead laws of the United States; and, that the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road."

It is sought to distinguish this case from the case at bar because Sjoli settled upon the land prior to the filing of the selection list. But this list was filed some four years before Sjoli made his homestead application and the decision of the state court appealed from was based on the ground that Sjoli had lost his settlement right by failing to make application within the statutory time. The reviewing court do not hold that this was error, but hold that the selection list, unapproved, created no right in the com-
28 pany, did not withdraw the land from homestead entry, and was no bar to Sjoli's homestead application at the time such application was made. The decision apparently assumes, as held by the state court, that Sjoli had lost any right he may have had on account of settling on the land prior to the filing of the selection list by failing to make entry within the statutory time of three months.

In Wisconsin Central R. R. Co. v. Price County, 133 U. S., 496; 33 L. Ed., 687, the Court say:

"The approval of the Secretary was essential to the efficacy of the selections, and to give the Company any title to the lands selected. His action in that matter was not ministerial but judicial. * * * And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and, if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the state, but for the protection of the United States against an
29 improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States."

This language is approved and applied in Humbird v. Avery, 195 U. S., 480; 49 L. Ed., 286.

In the case at bar the wording of the act as to selecting indemnity is substantially the same as that construed in Wisconsin Central R. R. Co. v. Price Co., supra, and differs somewhat from that construed in the Sjoli case, but no distinction is made on account of the difference in verbiage.

In United States v. Missouri, K. & T. Ry. Co., 141 U. S., 358; 35 L. Ed., 766, the court say that there is no escape from the conclusion that the lands in question, "if no rights had attached to them before their selection with the approval of the Secretary of the Interior,—could have been legally selected as indemnity
30 lands for that company. We say, prior to such selection and approval, because as to lands which may legally be taken for purposes of indemnity the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but, in the fullest legal sense, remains in the United States, until they are actually selected and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes."

In Oregon & C. R. R. Co. v. United States, 189 U. S., 103; 47 L. Ed., 726, the Court say:

"It is sufficient to say that the railroad company did not, by the order of 1870, relating to lands within the indemnity limits, acquire an interest in any particular odd-numbered sections within those limits; nor did that order prevent the bona fide occupancy by settlers of odd-numbered sections within such limits up to the time of approval of selections made by the railroad company of lieu lands to supply any deficit in the place limits."

It is insisted that the approval of the selection list, when made, related back to the date when the list was filed. But if the land re-

mained subject to homestead entry, as the foregoing deci-
31 sions indicate, and a valid homestead right had attached, I do not understand how it could be canceled and annulled by a subsequent approval of the list.

M. D. T.

Filed Jan. 20, 1907.
PETER O. SCOW, *Clerk*.

Notice of Appeal.

(Title of Cause.)

To Fred Wass and Pauline Wass, his Wife, Defendants, and P. B. Gorman, Esq., their Attorney, and Peter O. Scow, Clerk of the District Court, Todd County, Minnesota:

Please take notice, That the Northern Pacific Railway Company, plaintiff herein, hereby appeals to the Supreme Court of the State of Minnesota, from the order of the District Court overruling the demurrer interposed by plaintiff to the answer of the defendants herein, made and entered on the 20th day of January, 1908.

Dated March 10, 1908.

C. W. BUNN,
M. T. SANDERS,
Attorneys for Plaintiff, 211 N. P. Gen. Office Bldg., St. Paul, Minnesota.

32 In District Court, Seventh Judicial District.

STATE OF MINNESOTA,
County of Todd, ss:

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
FRED WASS and PAULINE WASS, His Wife, Defendants.

Findings of Fact and Conclusions of Law.

The above entitled cause, having been brought on for trial at the regular term of the District Court, held in and for the County of Todd and State of Minnesota, on the 15th day of November, 1907, Hon. M. D. Taylor, District Judge, presiding, plaintiff being represented by Charles W. Bunn and M. T. Sanders, as their attorneys, who filed a brief in said case, and defendants being represented by P. B. Gorman, as their attorney, who made an oral argument in said matter, the Court examined the record and all the papers and files in the case and after duly considering the matter, and being fully advised therein, made an order overruling the demurrer to defendants answer filed, as aforesaid, by plaintiff in said case.

From said order of the said district court, sitting within and for said county of Todd as aforesaid, overruling plaintiff's demurrer

plaintiff appealed to the Supreme Court of the State of Minnesota,
and the said case, appealed as aforesaid, being placed on the
33 Calendar of said Supreme Court at the General April Term
A. D. 1908, was on the 14th day of May, argued and submitted, on behalf of the appellant (Plaintiff in the court below) by their General Solicitor Charles W. Bunn, and on behalf of Respondents (Defendants in lower Court) by their attorney P. B. Gorman, and the said Supreme Court of the State of Minnesota, after examining the record, and all papers and files in the case, and after being fully advised in the premises and mature deliberations, thereupon had adjudged, determined, decreed and ordered that the Order of the Court below, herein appealed from, be, and the same is, in all things affirmed, and that the respondents have judgment accordingly.

And it was further determined and adjudged, that the respondents do have and secure of said Northern Pacific Railway Company, appellant herein, the sum of sixty-three and no hundre-ths dollars ($63.00) costs and disbursements in this cause, in the said Supreme Court, and that said respondents have execution for the enforcement thereof.

Pursuant to the aforesaid judgment, order, and decree of the said Supreme Court of the State of Minnesota and of the statutes in such cases, made and provided, after duly considering the record, all papers and files in the case, and being fully advised in all matter therein anywise appertaining and there being no reply filed in said case by plaintiff, or by anyone in his behalf, although more than twenty days have elapsed since the order, judgment and decree of said Supreme Court of the State of Minnesota, was filed and since notice thereof was duly served on Plaintiff-Appellant by Defendant's attorney, The Court finds as

34 *Matters of Fact*

that on the 4th day of December, 1899, the southeast quarter (S. E. ¼) of Section thirteen (13) township one-hundred twenty-nine (129) north of range thirty-two (32) west of the fifth (5) principal meridian, St. Cloud (now Duluth) Land District, was surveyed public lands of the United States, lying and being within the twenty (20) miles indemnity limits of the grant made to the territory of Minnesota, by act of congress approved March 3, 1857, (11 Stat. 195) for the purpose of aiding in the construction of railroads from Stillwater, by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch line via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the legislature of said territory may determine, also within the indemnity limits of the grant made to the state of Minnesota for the same purpose, by the act of congress, approved March 3, 1865 (13 Stat. 526 as amended by the act of Congress approved March 3, 1871 (16 Stat. 588).

That all right, title, and interest of the State of Minnesota, in and to the above described land, by reason of the act of Congress

above referred to, were conferred, by the act of the legislature of the State of Minnesota dated March first (1) 1877, on the Western Railroad Company of Minnesota, and subsequently by said Western Railroad Company assigned and transferred to the St. Paul and Northern Pacific Railroad Company, and thereafter, by said last named company, assigned and transferred to the Northern Pacific Railway Company, Plaintiff-Appellant herein.

35 That in the month of April, 1899, defendant, Fred Wass, being then, as now, a citizen of the United States and a resident of the State of Minnesota over the age of twenty-one years, the head of a family, not the proprietor of more than one hundred sixty (160) acres of land in any state or territory, entered upon, took possession of, and made a settlement on the lots of land above described, with the *bona fide* intention of entering the same under the homestead laws of the United States, and that ever since said date, he, the defendant, herein has maintained his said possession and use of said tracts, as a homestead and has resided there on and used the same as his only home; that he has cultivated said lands each year since settling thereon as aforesaid and has otherwise improved the same, that the improvements made and placed upon said lands by this defendant are of the reasonable value of twelve hundred (1200) dollars and that tracts of land themselves, in their improved state are of the value of twenty-five hundred dollars (2500).

That on the 4th day of December, 1899, defendant, Fred Wass, presented to and filed with the register and Receiver of the United States Land District of St. Cloud (now Duluth) in the State of Minnesota, within which land district said lands are located, a proper and legal application to enter said lands under the homestead laws of the United States, and accompanied such application by all the required proofs of his qualifications and acts as a homestead claimant, and at the same time tendered to the Receiver of said land Districts, the lawful fees and commissions properly chargeable upon the allowance of such application. That said register and receiver received and filed said application, and on the same day re-

36 jected the same and refused to receive the fees and commissions tendered by defendant, basing such refusal and rejection upon the sole grounds that the lands applied for were embraced in a then pending, though unapproved, selection applied for by the St. Paul and Northern Pacific Railroad Company. That the rejection of defendant's application for said lands as a homestead, was subsequently, on appeal, affirmed by the Commissioner of the General Land Office and by the Secretary of the Interior, respectively. That the Secretary of the Interior, on February 16, 1905, for the first time approved the selection of the above described tracts by the St. Paul and Northern Pacific Railroad Company, as indemnity land; that prior to said approval of the Secretary of the Interior, on February 16, 1905, as aforesaid, the said Secretary had not, in any way, authorized or approved the selection of the lands hereinbefore described, by any railroad company, whatever, under the grants aforesaid; that a patent of the United States for said lands was, on March 15th, 1905, issued to the State of Minnesota, designating the same as indemnity lands under the grants of March 3, 1857, March

3, 1865 and March 3, 1871, hereinbefore referred to, for the use and benefit of the railroad company legally entitled to the same, and that thereafter said patent was delivered to the Governor of the state of Minnesota as the agent of said state.

That all estate, title and interest of the state of Minnesota, in and to any and all lands falling within the provisions of the granting acts aforesaid, having been duly conferred on the Western Railroad Company of Minnesota, under and by virtue of the provisions of the act of the legislature of Minnesota, dated March 1, 1877,
37 as hereinbefore stated, and by an assignment of said railroad company, transferred to the St. Paul and Northern Pacific Railroad Company and by said last named Company, assigned and transferred to the plaintiff herein, the legal title to said lands under the patent in question became vested in the Northern Pacific Railway Company.

And the Court further finds as

"Conclusions of Law

that in the month of April 1899, when defendant, Fred Wass, settled upon the land above described, and in December of the same year, when he presented to the Register and Receiver of the St. Cloud, Minnesota Land District, his homestead application, as aforesaid, he, said defendant, was a citizen of the United States and a resident of the state of Minnesota, living in the said County of Todd and, in all respects was a qualified claimant to enter vacant government land under the homestead law. That the approval of the Secretary of the Interior, of the application of the Railroad Company, to select the said land, under the indemnity provision of their grant, after the settlement thereof of defendant and after his application, made as aforesaid, to enter the same, as a homestead, was erroneous and in violation of the homestead law.

That the application of the railroad company to select said tracts of land, under and pursuant to the provisions of their land grant, not having been approved by the Secretary of the Interior as required by law, or otherwise, prior to the 16th day of February, 1905, the above described tracts of land, and each and every part and
38 parcel thereof, was unappropriated, unreserved, vacant government land and the same was subject to entry under and pursuant to the homestead laws of the United States, in the month of April 1899, when defendant established his residence thereon, and on the 4th day of December, of the same year 1899, when defendant presented his homestead application, for said land, to the Register and Receiver of the St. Cloud Land District at St. Cloud, Minnesota;

That the rejection of the defendant's said homestead application, made as aforesaid, at St. Cloud, Minnesota Land Office, on the 4th day of December 1899, by the Register and Receiver of said Land Office, and subsequently, on appeal, by the Commissioner of the General Land Office, and later by the Secretary of the Interior, re-

spectively, was erroneous and in conflict with the provisions of law, in such cases made and provided;

That defendant's homestead application for said land, when presented as aforesaid, to the Register and Receiver of the said St. Cloud Land Office, on the 4th day of December, 1899, should have been accepted, approved and allowed, and placed of record, and the Receiver's Receipt therefor issued to and in the name of Defendant;

That the presentation of Defendant's homestead application for said land, as aforesaid, together with his tender of legal fees and commissions properly chargeable on the allowance of the same, taken in connection with his settlement and residence thereon, and with his improvement and cultivation of the same, operated to vest the equitable title of said land in defendant, in the same manner and to the same extent as would have been the case, had the said homestead application been accepted, approved, allowed and placed of
30 record, by said Register and Receiver, and the usual receiver's receipt issued therefor to defendant;

And that the said Northern Pacific Railway Company, holds the legal title to said lands as trustee for the use and benefit of Fred Wass, defendant herein;

That the plaintiff's prayer, request, and demand, in his complaint contained in the above entitled cause must be denied, refused, over-ruled, and rejected, that the said plaintiff must be ordered and required to convey to Fred Wass, defendant herein, by good and sufficient deeds of conveyance, the legal title to said above described land, to-wit: that southeast quarter (S. E. $\frac{1}{4}$) of Section thirteen (13) township one hundred twenty-nine (129) north of range thirty-two (32) west, of the fifth (5) principal meridian, Minnesota, containing one hundred sixty acres (160) more or less according to the government survey thereof.

To have and to hold together with all hereditaments and appurtenances thereto belonging or in any way appertaining unto the said Fred Wass, his heirs and assigns absolutely and forever.

That defendant have judgment for his costs and disbursements herein and execution for the enforcement thereof.

Dated Fergus Falls, Minn. July 28, 1908.

Let judgment be entered accordingly.

By the Court.

L. L. BAXTER,
District Judge.

Clerk's Office, Filed July 29, 1908.
PETER O. SCOW, *Clerk.*

40 STATE OF MINNESOTA,
County of Todd, ss:

I, Peter O. Scow, Clerk of District Court, in and for Todd County, State of Minnesota, do hereby certify that I have compared the foregoing paper writing with the original findings of fact and conclusions of law—Northern Pacific Railway Company, vs. Fred Wass and Pauline Wass, his wife—in the action therein en-

titled, now remaining of record in my office, and that the same is a true and correct copy of said original and the whole thereof.

Witness my hand and the seal of said Court, at Long Prairie, this 3rd, day of October, A. D. 1908.

[Seal District Court, Todd Co., Minn.]

PETER O. SCOW,
Clerk of District Court.
By CARRIE C. HANSMEYER, *Deputy.*

41 [Endorsed:] Nos. 3872. State of Minnesota, County of Todd, District Court, Seventh Judicial District. Northern Pacific Railway Company, a corporation, Pl'ffs vs. Fred Wass and Pauline Wass, his wife, Defendants. Findings of the Court. P. B. Gorman, Att'y for Defendants. St. Cloud, Minn.

42 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the findings of fact and conclusions of law in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol in the city of St. Paul, this 15th day of March A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

43 STATE OF MINNESOTA,
County of Todd, ss:

District Court, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY CO., Plaintiff,
vs.
FRED WASS and PAULINE WASS, Defendants.

Judgment and Decree.

The plaintiff in the above entitled cause having duly demurred to the Answer of the defendants herein, and said demurrer having duly come on for hearing before the Court, at the regular November 1907, term of said Court, within and for the said County of Todd and State of Minnesota, Hon. M. D. Taylor one of the judges of the said Court presiding, and having been duly argued and submitted, M. T. Sanders, Esq., appearing as attorney for plaintiff, in support of said demurrer, and P. B. Gorman Esq., appearing as attorney for defendants in opposition thereto the said Court being fully advised therein, and

mature deliberation therein had, did on the twentieth (20) day of January, 1908, file an order overruling said demurrer.

Plaintiff having appealed to the Supreme Court of Minnesota, from the aforesaid Order of the District Court, over-ruling said demurrer, and said appeal in said matter being brought on for hearing before the said State Supreme Court at the general April 1908 term of said Court, and being duly argued and submitted, the full court
44 presiding, Judge Charles W. Bunn, appearing as attorney for plaintiff in support of said appeal, and P. B. Gorman, Esq., appearing as attorney for defendants, in opposition thereto, the said Court being fully advised in said matter, after mature deliberation thereto had, determined, adjudged, decreed, and ordered, that, the order of said District Court herein appealed from by plaintiff, be, and is, in all things affirmed, and said Supreme Court further determined, adjudged, decreed and ordered that defendants have judgment against plaintiff for the sum and amount of sixty-three — ($63.00) costs in said Supreme Court.

No pleading of any kind whatever, except said demurrer having been served in reply, or otherwise, to defendants Answer, and more than twenty days having elapsed since the making and filing of judgment, Order and Decree of said Supreme Court, and since notice thereof, was duly served on plaintiff's said Attorney, by said attorney for defendants, and the said District Court within and for said County of Todd, Hon. L. L. Baxter, one of the Judges of said Court presiding having on the twenty-ninth (29th) day of July, 1908, filed its findings of fact and its conclusions of law, together with its order in said matter, now, therefore, in pursuance of said order, and of the mandate of the Supreme Court of Minnesota, dated on the 26th day of June 1908, and filed in this office on the 29th day of July 1908.

And on motion of P. B. Gorman, attorney for defendants, it is determined, adjudged, and decreed and ordered, that the equitable title of the said land, to wit: the southwest quarter (SW. ¼)
45 of section thirteen (13), township one-hundred twenty-nine (129), north of range thirty-two (32), west of the fifth (5th) principal meridian, containing one-hundred sixty acres (160), more or less according to the government survey thereof, is in the defendant, Fred Wass, under and by virtue of the homestead laws of the United States, that the legal title of the said land is in the Northern Pacific Railway Company under and by virtue of the patent therefor of the State of Minnesota; That said Northern Pacific Railway Company, plaintiff herein, holds the said legal title in and to the herein before described land as trustee to the use and benefit of defendant Fred Wass; and, that the Northern Pacific Railway Company is hereby directed, ordered, and commanded to assign, transfer and convey unto the aforesaid defendant Fred Wass, the legal title to the said land and to all and each and every part and parcel thereof, by good and sufficient deed of conveyance.

To have and to hold, together with all the hereditaments and appurtenances thereunto belonging and in anywise appertaining,

unto the said defendant, Fred Wass, his heirs and assigns, absolutely and forever.

And it is further determined, adjudged, decreed, and ordered, that defendants have judgment against the plaintiff for the sum and amount of eighty-three and 55/100 Dollars as costs and disbursements herein, said sum including sixty-three ($63.00) Dollars, the amount taxed and allowed in Supreme Court of the State of Minnesota as per mandate of said Court, herewith filed.

Dated July 29th, 1908.

[District Court Seal.]

PETER O. SCOW,
Clerk of Court.

Clerk's Office, filed July 29th, 1908.
PETER O. SCOW, *Clerk.*

46 STATE OF MINNESOTA,
County of Todd.

District Court, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY CO., Plaintiff,
vs.
FRED WASS and PAULINE WASS, Defendants.

It is stipulated that on the appeal to the Supreme Court from the judgment entered herein July 29, 1908, the return of this Court to the Supreme Court made upon the appeal heretofore taken from the order entered herein over-ruling the plaintiff's demurrer shall, together with certified copy of the judgment since entered and of the notice of the appeal from the judgment now taken and the waiver of bond, constitute the return for the purpose of the appeal from the judgment.

Dated October 1, 1908.

CHARLES W. BUNN,
Attorney for Plaintiff.
P. B. GORMAN,
Attorney for Defendants.

Clerk's Office, filed Oct. 2nd, 1908.
PETER O. SCOW, *Clerk.*

47 STATE OF MINNESOTA,
County of Todd:

District Court, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY CO., Plaintiff,
vs.
FRED WASS and PAULINE WASS, his wife, Defendants.

At the request of the plaintiff the defendants hereby waive the giving of bond by plaintiff on appeal to the Supreme Court from the judgment entered herein July 29, 1908.
Dated September *30*, 1908.

P. B. GORMAN,
Attorney for Defendants.

Clerk's Office, filed Oct. 2nd, 1908.
PETER O. SCOW, *Clerk.*

48 STATE OF MINNESOTA,
County of Todd:

District Court, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
FRED WASS and PAULINE WASS, his wife, Defendants.

To P. B. Gorman, Esq., Attorney for Defendants.

SIR: Please take notice that the plaintiff appeals to the Supreme Court from the judgment entered herein on the 29th day of July, 1908, in favor of defendants and against plaintiff. Dated September 30, 1908.

CHARLES W. BUNN,
Attorney for Plaintiff.

Clerk's Office, filed Oct. 2nd, 1908.
PETER O. SCOW, *Clerk.*

Service of the above Notice admitted this 3rd day of October, A. D. 1908.

[District Court Seal.]

PETER O. SCOW,
Clerk of District Court, Todd Co., Minn.
By CARRIE C. HANSMEYER,
Deputy.

49 STATE OF MINNESOTA,
County of Todd, ss.

I, Peter O. Scow, Clerk of District Court, within and for said County of Todd and State of Minnesota, do hereby certify that I have compared the foregoing paper writing, with the original judg-

ment and Decree, Notice of Appeal, Waiver of Bond and Stipulation, Northern Pacific Railway Company vs. Fred Wass and Pauline Wass, his wife in the action therein entitled now remaining of record in my office, and that the same is a true and correct copy of said original and the whole thereof.

Witness my hand and the seal of said Court at Long Prairie, this 3rd, day of October, A. D. 1908.

[District Court Seal.]

PETER O. SCOW,
Clerk of District Court.
By CARRIE C. HANSMEYER,
Deputy.

50 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the judgment and decree in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 15th day of March, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

51 16027.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1908.

No. 262.

NORTHERN PACIFIC RY. CO., Appellant,
v.
FRED WASS and PAULINE WASS, His Wife, Respondents.

Per Curiam:

This is an appeal from the judgment of the district court of the county of Todd in favor of the defendants. The record herein presents for our decision the precise question determined, adversely to the appellant, by this court upon a former appeal herein from an order overruling a general demurrer to the defendant's answer. Northern Pacific Ry. Co. v. Wass (Minn.) 116 N. W. R. 937. We adhere to our former decision, and hold, for the reasons stated in the opinion on the former appeal, that the judgment appealed from must be affirmed. So ordered.

52 15625.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1908.

No. 160.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
v.
FRED WASS and PAULINE WASS, His Wife, Respondents.

Syllabus.

On the authority of Sjoli v. Dresbeel, 199 U. S. 564, and Hoyt v. Weyerhaeuser, filed April 17, 1908, by the United States Circuit Court of Appeals, 8th Circuit, Held:

Under the provisions of the acts of Congress, approved March 3, 1857, and March 3, 1865, as amended by the act approved March 3, 1871, that until the Secretary of the Interior approves of the list filed by the railroad company, designating indemnity lands, such lands are not segregated from the public domain, and are subject to entry under the homestead laws, although the list may have been filed prior to the date of settlement on the land by the homesteader.

Affirmed.

53 15625.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1908.

No. 160.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
v.
FRED WASS and PAULINE WASS, His Wife, Respondents.

Opinion.

Action in ejectment by appellant to recover possession of a quarter section of land in Todd County. Appellant claims title under the acts of Congress, approved March 3, 1857, and March 3, 1865, as amended by the act approved March 3, 1871. These acts contain what are known as the Northern Pacific land grants. Respondents claim right of possession under and by virtue of a settlement under the United States homestead laws, and appellant relied upon its patent title. Appellant demurred to respondents' answer upon the ground that it did not state facts sufficient to constitute a cause of action, and appealed from an order of the trial court overruling the same.

The facts as presented by the answer are as follows: The land is within the indemnity limits of the grant referred to. A list of lands, including the tract in question and purporting to be a list of selections under the indemnity provision, was filed December 31, 1877. An amended selection list, including the tract involved, was filed December 4, 1889. A re-arranged list of indemnity selections, embracing the disputed tract, was filed in the St. Cloud land office on February 12, 1892, wherein, for the first time, was designated a proper basis for each tract so selected. In April 1899, re-
54 spondent, Fred Wass, being duly qualified, made settlement on the land with the bona fide intention of entering the same under the homestead laws, and has ever since maintained such possession and resided thereon as his homestead, and has made improvements exceeding $2500, in value, and on the 4th of December 1899, presented to and filed with the register and receiver of the United States land office at St. Cloud, a proper and legal application to enter such land under the homestead laws. The application was received and filed, but was rejected upon the ground that the land applied for was embraced in a then pending, though unapproved, indemnity selection of the St. P. & N. P. Ry. Co. Respondent appealed to the Commissioner of the general land office, and on July 10, 1903, that officer affirmed the decision of the local land officers, and rejected his application upon the same ground. He appealed to the Secretary of the Interior, who, January 9, 1904, affirmed the decision of the Commissioner on the ground stated. On February 16, 1905, the Secretary of the Interior, for the first time approved the list of indemnity selections made by the railway company, and on March 15, 1905, patent was issued to the state of Minnesota describing the same as indemnity lands under the provisions of the aforesaid grants, and appellant succeeded to all of the right, title and interest of the several grantees named in the several acts of Congress, and the legal title vested in appellant.

The only question involved is whether the land was open to settlement under the United States homestead laws, between the date of filing the proper list of selection and the date of approval thereof by the Secretary of the Interior. It is conceded by the demurrer that a proper list of selection was filed with the
55 Secretary of the Interior on the 12th of February 1892; that respondent settled on the land in April 1899, made application to enter the land under the homestead law December 4, 1899, and that the selection was finally approved February 16, 1906.

The trial court based its decision in overruling the demurrer upon the case of Sjoli v. Dreschel, 199 U. S. 564, wherein the facts were as follows: The railroad company filed the map designating its definite route, November 21, 1871, which map and location was approved December 25th following. On June 19, 1885, the company filed its list of selections, at the proper land office, which list was rejected as to the land involved in that suit. In July 1885, the company appealed from that decision. In 1889 Sjoli applied to the proper land office to enter the land under the homestead laws, and his application was rejected upon the ground that the land was

considered to be within the indemnity limits. In January 1895, Sjoli again made application at the land office to enter the land as a homestead, at which time his application was received and patent was issued to him June 18, 1901. It will be observed that the facts in the Sjoli case differ from the case now before us in the following respects: Sjoli had settled on the land prior to the filing of the list of selections, and had attempted to enter the same under the homestead law in 1889; whereas in the case before us, respondents did not settle on the land until after the filing of the list. In the Sjoli case, at the time of the trial it did not appear that the list had ever been approved by the Secretary of the Interior. In the present case the list of selections was approved. In the Sjoli case a patent had issued to him, while in this case respondent's application was
56 never allowed, but the selection of the railway company was approved and a patent issued to appellant prior to the time of the commencement of this action. In the Sjoli case the Federal Supreme Court laid down four general propositions: (1) That as to place lands, the grant took effect upon the definite location of the railroad, and the filing and acceptance of the map, and that thereby such lands became segregated from the public domain. (2) That no right to land within the indemnity limits attached in favor of the railroad company "until after selections made by it with the approval of the Secretary of the Interior." (3) "That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, were subject to be disposed of by the United States, or to be settled upon and occupied under the preemption and homestead laws of the United States." (4) "That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road." In applying those propositions to the facts of the case, the court said: "We have seen that Sjoli's settlement upon the land was in 1884, and his original application to enter it was in 1899; whereas the railroad company made and filed its list of selections of lands within indemnity limits to supply alleged deficiencies in place limits in 1885, Sjoli being still in occupancy of the land. But, as already stated, the result of the cases in this court is that the railroad company did not acquire an interest in any particular lands within the indemnity limits merely by filing its lists of selections nor until its selections were approved by the Secretary of the Interior." Again: "So that when
57 Sjoli settled upon the land it was, so far as the railroad company was concerned, part of the unappropriated public lands open to settlement under the homestead laws. The railroad company had no direct legal interest in it. The company's unapproved selections did not, therefore, stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the preemption or homestead laws. On the contrary, notwithstanding the filing of such lists, they remained open, as before, to settlement or occupancy under those laws, until the selections were formally approved by the

Secretary of the Interior and the lands withdrawn from settlement or sale." Appellant has called our attention to several cases referred to in the opinion, and in the marginal note of the report, and submits that the court could not have intended to place its decision upon the specific ground that the list had not been approved, although it had been filed at the time Sjoli made settlement upon the land. Counsel argue, with great force, that the case was rightly disposed of upon the ground that settlement antedated any action by the company to cause the indemnity lands to be segregated, and that the point involved in the present case was not necessarily passed upon.

In order that our position may be entirely clear, we will refer to some of the cases upon which the Sjoli decision was based. In Hewitt v. Schultz, 180 U. S., 139, the court held that under the act of July 2, 1864, the Secretary of the Interior had no authority to withdraw all of the lands included within the indemnity limits, and that until a valid selection was made by the grantee, the lands within the indemnity limits were open to disposition by the
58 United States. The court stated the proposition as follows: "Was it competent for the Secretary of the Interior immediately upon acceptance of the map of definite location to include in his withdrawal from sale, or entry, lands within the indemnity limits?" The decision was by a divided court, and the majority considered the question not free from doubt, but under the circumstances gave great weight to the opinion of the department which was charged with the execution of the statute, the Secretary of the Interior having delivered an opinion to the effect that the entire amount of lands within the indemnity limits could not be withdrawn. Oregon & C. R. R. Co. v. United States, 189 U. S., 103, was a case wherein the settler filed upon the land before the list of selections was filed, and the case seems to have been disposed of on that particular ground. The court say: "These principles are applicable to the present case if, as contended by the United States, the railroad company did not acquire, and could not have acquired, an interest in specific sections of land within the indemnity limits before their actual and approved selection, under the direction of the Secretary prior to the date of occupancy by the respective settlers." And again: "Now it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits, which interest relates back to the date of the granting act, the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the land
59 department and then its right relates to the date of the selection." By this language it would seem that the court did not mean that the filing of the list by the company was of no effect whatever, because it was stated that upon approval, its right relates back to the date of selection—that is, the first step in making the selection—the filing of the list. The court's conclusion is specifically stated as follows (p. 115): "We adjudge that the rights which

bona fide occupancy gave to the settler under the act of 1866 are not defeated by a mere selection afterwards of the lands by the railroad company—the settler having, after the lands are surveyed, promptly taken the necessary steps to protect his rights under the homestead laws." The court subsequently applied the fiction of relation in United States v. Anderson, 194 U. S., 394, and held, that although the legal title was in the United States during the time intervening between filing and approval of the list, yet the successor in interest of the railroad company, the lands having been approved, was permitted to recover from the government the amount which it had recovered as damages from a trespasser upon the land during that intervening period. It was held in St. Paul & Sioux City Railroad Company v. Winona & St. Peter R. R. Co., 112 U. S., 720, that the railroad company acquired no vested interest in the lands within the indemnity limits by the mere filing of the map of its line of railroad, and said: "Was there a vested right in this company, during all this time, to have not only these lands, but all the other odd sections within the twenty mile limits on each side of the line of the road, await its pleasure? Had the settlers in that popu-
60 lous region no right to buy of the government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, and forbidden to cultivation? It is true that in some cases the statute requires the land department to withdraw the lands within these secondary limits from market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections. It by no means implies a vested right in said company, inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection in such case, and having no right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected. The unascertained float then becomes a vested right to an identified tract of land." It would seem that the court recognized that the company must have reasonable time, after filing its list, to secure the approval thereof by the party designated for that purpose in the granting act. That a vested right or interest is different from an inchoate, contingent right, or, as above stated, "a float," is apparent from a consideration of the Wisconsin Central Railroad Company v. Price County, 133 U. S., 496, where it was held that until the lands were formally approved by the Secretary of the Interior, the railroad did not acquire such a vested right as made the lands subject to taxation. In speaking of a simi-
61 lar question in United States v. Missouri K. & T. Ry. Co., 141 U. S., 358, the court used the following language: "We say, prior to such selection and approval, because as to lands which may legally be taken for purposes of indemnity the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted,

but, in the fullest legal sense, remains in the United States, until they are actually selected and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes." In Humbird v. Avery, 195 U. S., 480, the court cited from Wisconsin R. R. Co. v. Price County, supra, as follows: "Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts." Our attention has also been called to the fact that Mr. Justice Moody, when Attorney General, advised the Secretary of the Interior that the Sjoli decision applied only to those cases wherein it appeared that the rights of the settler took effect prior to the time of the filing of the list.

We have carefully considered the cases above referred to, among others, and while it is true that the rights of a homesteader who made settlement after the date of filing the list, was not directly presented by the facts in the Sjoli case, nor in any of the decisions upon which it was apparently based, yet the propositions of
62 law are so clearly announced that we cannot avoid the conclusion that it was the intention of the court to decide that the railroad company acquired no rights whatever for any purpose until the approval of the list by the Secretary of the Interior; that it was the intention of the court to hold that the grant applied to such lands only as might be found unappropriated within the place limits upon the filing and approval of the map designating the location of the road, and that the company was merely given an opportunity to supply the deficiency, if any, from the so-called indemnity limits; that the Secretary of the Interior and not the company should do the selecting; that, conceding the Secretary was not required to act at all until the company made preliminary selection, setting off tract against tract, still, after the company had done all in its power to bring the matter before the Secretary, that officer might dispose of it at his convenience; that although the Secretary had reasonable time to examine into the facts and determine disputed questions, notwithstanding such contingencies and delays, the land was subject to settlement in the meantime, and the attempt of the company to secure the same was without avail. Such, we understand to be the effect of the decision, and while doubtful that such granting acts as theretofore construed by that court, and by the land department, were authority for the conclusion reached, we feel compelled to accept the decision as conclusive in the case before us. We are justified in this view by the recent decision of the Circuit Court of Appeals, 8th Circuit, in the case of Hoyt v. Weyerhaauser, where that court construed the opinion in Sjoli v. Dreschel, and applied the principles there announced to a case similar to this.

Affirmed.

63 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the opinion of the Supreme Court of Minnesota in 116 N. W. R. 937 in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 15th day of March, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

64 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1908.

No. 262.

Appeal from District Court, Seventh Judicial District, County of Todd.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
vs.
FRED WASS and PAULINE WASS, His Wife, Respondents.

This cause having been duly argued and submitted at the General October Term of this Court, A. D. 1908, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that the Respondents above named have judgment accordingly.

Entered October 7th, A. D. 1908.

By the Court,

Attest:

C. A. PIDGEON, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk.*

65 [Endorsed:] No. 16027. State of Minnesota Supreme Court. Copy of order for judgment. Filed October 7th, A. D. 1908. C. A. Pidgeon, Clerk.

29

FILED.
DEC 6 1909
JAMES H. McKENNEY,
CLERK.

SUPREME COURT
of the
UNITED STATES,
October Term, 1909.
No. [illegible] 12.

CHARLES D. CAMPBELL,
Appellant,

VS.

JOHN A. HUMBIRD and
FREDERICK WEYERHAUSER,
Appellee.

BRIEF OF
CHARLES D. CAMPBELL,
Appellant.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

H. H. HOYT,
Solicitor for Appellee.

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SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, A. D. 1909.

No. 176.

CHARLES D. CAMPBELL, Appellant.

vs.

JOHN A. HUMBIRD & FREDERICK WEYERHAUSER, Respondents.

BRIEF FOR APPELLANT.

The contention in this case, is in respect to the title to the Southeast Quarter of Section 21, Township 54, North, Range 12, West, Duluth land district.

The defendants claim title to the land as the grantees of the patentee, the Northern Pacific Railway Company, while the appellant claims to have acquired the equitable title to said land, and entitled to have his title to said land perfected by a decree of this court. The appellant applied to purchase said land under the Act of Congress dated June 3, 1878, as amended by Act of August 4, 1892, Campbell being in all respects duly qualified, filed his application to purchase said land under the provisions of said act, October 26, 1895, the local officers rejected his application for the reason that said land had been selected prior to the application of Campbell by the Northern Pacific Railroad Company, and included in its

list of selections filed in the Duluth Land Office October 17, 1883, said list of selections were re-arranged by said railroad company and filed in the local office April 11, 1893. Campbell renewed his application to purchase said land on November 9, 1896, and again December 28, 1897. These applications were all rejected because of the conflict with the Northern Pacific Railroad Company's prior selection, and appeals taken to the Commissioner of the General Land Office. The land in controversy is within the so-called second indemnity belt of the grant to aid in the construction of the Northern Pacific Railroad, and it is deemed important to refer to the material sections considered as having a bearing on this controversy.

An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern Route. (13 Stat. at L. 365.)

The first section of the Act, mentioned by names 132, individuals who in life were known as politicians, warriors, business men and promoters, and the door left open for all persons who desired to join and be associated with them, they were by said act created and erected into a body corporate and politic—in deed and in law by the name, style and title of the **"Northern Pacific Railroad Company,"** and by that name shall have perpetual succession and shall be able to sue, and to be sued, etc.

And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with

the appurtenances, namely beginning at a point on Lake Superior in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route as shall be determined by said company within the territory of the United States on a line north of the 45th degree of latitude to some point on Puget Sound * * * and is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purpose of this act, as herein set forth.

The capital stock of said company shall consist of one million shares of $100.00 each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the by-laws of said corporation shall provide. * * * The persons hereinbefore named are appointed commissioners, and shall be called the board of commissioners of the Northern Pacific Railroad Company and 15 shall constitute a quorum for the transaction of business. * * * The President and Secretary of the board of commissioners shall appoint a time and place for the first meeting of the stockholders of said company. * * So soon as 20,000 shares shall in good faith be subscribed for, and $10.00 per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers of the stock of said company * * * and such subscribers as shall attend the meeting so called * * * shall elect by ballot 13 directors for said corporation.

At the first meeting of said board of commissioners they shall organize by the choice from its members of a president, vice-president, secretary and treasurer * * * said commissioners, treasurer and secretary, shall then

deliver over to said directors all the properties, subscription-books and other books in their possession and therefore the duties of said commissioners and the officers previously appointed by them, shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate.

SEC. 2.—That the right of way throug the public lands be and the same is hereby granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph line as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, materials of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of 200 feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, work-shops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States.

SEC. 3.—That there be and is herein granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway. Every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territory of the United States, and 10 alternate sections of land per mile on each side of said railroad wherever it passes through any state, and

whereveer on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General land office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate section, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections: Provided: That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act. * * * And provided further: That no money shall be drawn from the treasury of the United States to aid in the construction of said "Northern Pacific Railroad."

SEC. 4.—And be it further enacted: That whenever said "Northern Pacific Railroad Company" shall have 25 consecutive miles of any portion of said railroad and telegraph line ready for the services contemplated, the President of the United States, shall appoint three commissioners to examine the same, and if it shall appear that 25 consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of land as aforesaid shall be issued to said company, confirming to said company the right and title to said lands, situated

opposite to and co-terminus with said completed section of said road; and from time to time, whenever 25 additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every 25 miles of said road is completed as aforesaid. Provided that not more than 10 sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order as a first class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota. Provided, also, that lands shall not be granted under the provisions of this act on account of any railroad or part thereof, constructed at the passage of this act.

SEC. 6.—And be it further enacted: That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are conveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on he public domain." Approved May 20, 1862, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those.

SEC. 8.—And be it further enacted, that each and every grant, right, and privilege herein are so made and given to, and accepted by said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the 4th day of July, 1876.

SEC. 9.—And be it further enacted: That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then in such case, at any time hereafter, the United States by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

SEC. 10.—And be it further enacted: That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital mentioned in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bond shall ever be issued by said company on said road, or mortgage or lien made in any way, except by the consent of the Congress of the United States.

SEC. 12.—And be it further enacted: That the acceptance of the terms, conditions, and impositions of this act by the said Northern Pacific Railroad Company shall

be signified in writing under the corporate seal of said company, duly executed pursuant to the directions of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States.

SEC. 19.—And be it further enacted: That unless said Northern Pacific Railroad Company shall obtain bona fide subscriptions to the stock of said company to the amount of two million of dollars with 10 per centum paid within two years after the passage and approval of this act, it shall be null and void.

SEC. 20.—And be it further enacted: That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefit of the same for postal, military, and other purposes. Congress may at any time, having due regard to the rights of said Northern Pacific Railroad Company, add to, alter, amend or repeal this act.

Folly and ignorance met in the halls of Congress—ignorance conceived and begot the Northern Pacific Railroad Company. It is a finished product out of the brains of the railroad men in and out of Congress at that time.

Here was an act of Congress granting 50,000,000 acres of the public domain to aid in the construction of the Northern Pacific Railroad, from Lake Superior to Puget Sound, the distance being estimated at 2600 miles, without any indication that among the promoters of this scheme there was one dollar among the whole outfit. Congress however saw fit by Sec. 10, to expressly prohibit

any mortgage or construction bonds ever being issued by this company on said road, nor mortgage, or lien, made in any way, except by the consent of the Congress of the United States." By Section 4 of said act, it was provided that on the completion of 25 consecutive miles of any portion of said road, and it being examined in the manner provided for in said section, patents shall be issued to said company on said sections, but it was further provided "that not more than 10 sections of land per mile, as said road shall be completed for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first class railroad from the point of beginning on Lake Superior to the western boundary of Minnesota."

It was made a condition as it would appear by Sec. 8, of said act, that said Northern Pacific Railroad Company should commence the "work on said road, within two years from the approval of this act by the President, and should not complete less than 50 miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the 4th day of July, 1876." Although we were not then at the age of frenzied finance, even in 1864, a railroad could not be built without money, the road was to run through an unsettled country, inhabited by savage beast, and much more savage men, no pecuniary help could be expected from the country through which the road would pass. I think it could be safely affirmed that the 132 persons, who by the first section of said act were "created and erected into a body corporate and politic in deed and law, by the name and style, and title of the Northern Pacific Company" were more white men in number than would be found within

the lateral limits of this 2200 miles of said road. I submit to the court, that under the act of July 2, 1864, the Northern Pacific Railroad Company was born paralytic, it could not move, it had no money and that is what the railroad companies feed upon. The Northern Pacific Railroad Company lacked it, it was essential to carrying out this scheme. This company was only half made up when ushered into this breathing world, and that so lamely and unfashionable that nothing could be done with it.

When one looks back 45 years and notices that within a few years the government had given away 266,000,000 acres of the public domain to railroad and other corporations, a territory not far in extent from the total area of France and Germany, two countries which support between them a population much greater than the whole population of the United States, nearly nine tenths of all the vast land grants in the United States were made during the Civil War. That was a period of reckless and prodigal expansion which marked the decade which saw the beginning and the end of the rebellion.

From 1864 to 1870, nothing was done by the original promoters of this road, the Northern Pacific Railroad Company, they appeared to have fallen into a state of inocuous desuetude; but on May 31, 1870, another band of patriots, but more thrifty than the first entered upon the scene. They proposed to Congress to take up the work and construct the road. Although at this time, no line of said road had been marked upon the surface of the earth, no work had been done towards its construction, not an acre of land had been earned by the company, they asked Congress to give its consent to the execution of a mortgage upon the lands granted by Congress, which at that time belonged to the United States, and this for

the purpose of raising money, to begin the construction of this road. They also asked for an extention of the indemnity limits, 10 miles on each side of the line of said road beyond the limits of the grant of July 2, 1864.

This action resulted in the passage by Congress of the following joint resolution, the title to which is, "A resolution authorizing the Northern Pacific Railroad Company, to issue its bonds for the construction of its road, and to secure the same by mortgage and for other purposes." The resolution approved May 31, 1870, is in the words and figures following, to-wit:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled. That the Northern Pacific Railroad be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution, and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct under the provisions, and with the privileges, grant, and duties provided in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory, in which said main line or branch may be located, at the time of the final location thereof, the amount of land per mile granted by Congress to said Company, within

the limits prescribed by its Charter, then said Company shall be entitled under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road beyond the limits prescribed in said Charter, as will make up such deficiency, on said main line or branch, except mineral and other lands, as excepted in the charter of said Company of 1864 to the amount of the lands that have been granted, sold, reserved, occupied by homestead settled, pre-empted, or otherwise disposed of. Subsequent to the passage of the Act of July 2, 1864. And that 25 miles of said main line, between its western terminus and the City of Portland, in the State of Oregon, shall be completed by the first day of January, 1872, and 40 miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points.

Provided all lands hereby granted to said company which shall not be sold or disposed of, or remain subject to the mortgage by this act authorized at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars, and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgage land hereby granted, or any of them be sold by the trustees to whom such mortgage may be executed, either at its maturity, or for any failure or default of said company under the terms thereof such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not

less then sixty days previous notice, in single sections or sub-divisions thereof, to the highest and best bidder.

Provided further: That in the construction of the said railroad, America iron or steel only shall be used—the same to be manufactured from American ore exclusively.

Sec. 2. And be it further resolved: That Congress may at any time, alter or amend this joint resolution, having due regard to the rights of said company, and any other parties. (Approved May 31, 1870.) (16 Stat. at L. 378.)

After the passage of the joint resolution of May 31, 1870, authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage and for other purposes, the following action was taken by the Northern Pacific Railroad Company:

The map of the general route of this road was filed in the office of the Commissioner of the General Land Office August 13, 1870. It could not however have been the intention of Congress by the approval of the act of July 2, 1864, to give to the Northern Pacific Railroad Company, the absolute authority to fix the point of the eastern terminus of its road. The charter granted by Congress to said company was in the nature of a contract, to which each party must give its assent to any act that might effect the same in order to give it validity. By granting to this company 50,000,000 acres of the public domain to aid in the construction of its road, the government had a vital interest as to where the eastern terminus of this road should be.

When the Northern Pacific Railroad Company filed its map of its general route, August 13, 1870, fixing its eastern terminus at the mouth of Montreal River (said river being the boundary line between the States of Wisconsin and Michigan) it was thus chosen, because it was the farthest point the company could extend its road and obtain land.

Although the point was on Lake Superior, it was in a wilderness and entirely unsuitable for the termination of a railroad; the land department without any examination, filed the map of the general route and of definite location—fixing the eastern terminus of said road at the mouth of Montreal River, and the Commissioner of the General Land Office, at the same time withdrew the land co-terminus to said road, and such withdrawal included the place as well as the indemnity lands.

With the company's eastern terminus established—the line of its route ran westerly to the Columbia River in the then territory of Washington.

By Section 10 of the Act of July 2, 1864, the Northern Pacific Railroad Company was prohibited from issuing any mortgage or construction bonds or lien made in any way except by the consent of the Congress of the United States. The Company, however, on May 31, 1870, prevailed upon Congress to give its assent to the sales of its bonds to aid in the construction of its railroad, with authority to secure the payment of the same by a mortgage on its prospective property; at the date of this joint Resolution the Northern Pacific Railroad Company had not filed its map of general route or definite location, it was not the owner of any lands. It had not at that time commenced the construction of its road.

However, under the authority of this joint Resolution, the Northern Pacific Railroad Company gave a

mortgage dated July 1, 1870, covering the entire grant from Lake Superior toPuget Sound, to secure the payment of construction bonds to not exceed $50,000 per mile of road, the legal and equitable title to this land was at that time in the United States. This mortgage was given by the railroad company to Jay Cooke and J. Edgar Thompson, whe were named the trustees.

The length of the road was estimated in the mortgage at 2600 miles. From the money raised as the result of this mortgage the Northern Pacific Railroad Company commenced the construction of its road in 1871, at Thomson's Junction, about 20 miles west of Duluth and continued westerly from that point to the Missouri River. On January 1, 1874, the said Northern Pacific Railroad Company was placed in the hands of a receiver. From an examination of its affairs it was found that said company had disposed of $84,000,000. of its stock, had issued bonds in the sum of $30,735,600., and had received for the sale of lands bonds to the amount of $15,000,000., making a total at its face value of $129,735,600. The construction of this road should be credited with 400 miles of constructed railroad, and by reason of such construction with the title to 8,115,198 acres of land.

The line of the road as definitely fixed passed through the States of Wisconsin, Minnesota and Oregon, and through the territories of Dakota, Montana, Idaho and Washington. If we included the indemnity limits attached to said grant, the land embraced therein would be every alernate section designated by odd numbers for 80 miles in a state, and 120 miles in a territory. The land granted to this company within its place limits would be about 50,000,000 acres of the public domain, equal to about 78,000 square miles of land, which would equal the land within the boundaries of the States of Maine, New

Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey and Maryland. If the indemnity limits were added to the granted land, the area would equal the lands within the boundaries of the States of New York, Pennsylvania and Maryland. This enormous quantity of land has been withdrawn from settlement or disposal since August 17, 1870, or 39 years. The land department whose duty it is to protect the interest of the people of the United States in all matters pertaining to the public domain, supinely assented to this assumption of title. The Northern Pacific Railroad Company was supreme within the halls of Congress. Its opinion as to its rights, apparently dominated every branch of the land department. The company has never had any use for the charter of its creation as defining its powers, but assumed although brought into its existence by the Act of July 2, 1864, that it could do as it pleased.

The surface of the ground from Thomson Junction to the Missouri River, is nearly a dead level plain, nature seems to have graded the whole distance. There was no heavy grading to be done, no deep cuts to be made, no expensive filling, no large expense in bridging, no right-of-way to be bought. There were no grounds for station-houses, water tanks or other structures, to be purchased; no stone, timber or ties to be paid for; all these things were made a free gift from the government. Taking into consideration these facts—this railroad could have been easily constructed for $1500.00 per mile. If so, this 400 miles of constructed road should not have exceeded six million dollars. If we take the face value of the stock and bonds that were sold, together with the amount received from the sale of land, the aggregate would amount to $129,136,600.

THE RE-ORGANIZATION.

The plan of reorganization of the financial affairs of the Northern Pacific Railroad Company was subsequently proposed and adopted. By such plan, the capital stock of One Hundred Million Shares was to remain as fixed in the Act of July 2, 1864, and the stock was to be divided into Preferred and Common Stock. The amount of Preferred Stock was fixed at Fifty-one Million Shares, and the amount of Common Stock at Forty-nine Million Shares. The proposed plan was to use the amount received for the Preferred Stock to take up the $30,735,600 in bonds, and for every $1,000 of these outstanding bonds it proposed to give to the holders of the same, Preferred Stock to the amount of $1,400.00, this would take Forty-three million shares of Preferred Stock to purchase the $30,730,600 in bonds. The remainder of the Preferred Stock was to be used to retire outstanding land warrants, also bonds that had been issued in payment of the floating debt of the company, and for the purpose of carrying into effect the plan of re-organization. There was no authority in the charter of the Northern Pacific Railroad Company authorizing the dividing of its stock into preferred and common, or to give any portion of its stock a preference over any other part thereof. Under this plan of re-organiaztion, the preferred stockholders had the right to vote, the common stockholders had not. The preferred stockholders were entitled to dividends in each calendar year not exceeding eight per cent per annum on the net returns of the road before any dividends could be paid on the common stock. By this plan it was also agreed that the preferred stock might be convertible at par into land belonging to the company east of the Missouri River in the State of Minnesota, and the Territory of Dakota. The Common Stock was to have no voice in the management of the affairs of the company, and was

to receive no dividends on such stock until there was a surplus after dividends were paid on the preferred stock. By the consummation of this plan of re-organization the financial affairs of the Northern Pacific Railroad were wholly rearranged. Substantially all of its indebtedness existing at the time of the adoption of the plan were paid. Its capital stock outstanding at that time was surrendered, and the preferred and common stock provided for. It was an adjustment of its financial affairs under and within the original act of incorporation, and without the sanction of any additional lagislation by Congress. The preferred stockholders were placed in control of the affairs of the company, which together with the subsequent bond holders, have since managed to shape the policy of the Railroad Company.

Whilst it is true that Attorney General Harmon in 1897 rendered to the Secretary of the Interior an opinion favorable to the Wisconsin Company upon the subject of the Northern Pacific land grant, and whilst it is the fact that another opinion upon the same subject to the same department and of like import, was rendered by Attorney General Moody in 1905, neither of the opinions, as I shall endeavor to show, meets the real question involved here.

To follow this matter understandingly, it should be bourne in mind that three separate and distinct organizations have had to do with the Northern Pacific Estate:

First.—The Northern Pacific Railroad Company, the corporation which Congress created by an Act approved July 2, 1864, and which may be called the "Federal

Second.—A voluntary association of bondholders organized September 29, 1875, in New York City, under the same name (The Northern Pacific Railroad Company), which may be termed the "Organization of 1875."

Third.--The present Wisconsin corporation, chartered under the name of the Superior & St. Croix Railroad Company, now called the Northern Pacific Railroad Company, which may be termed the "Wisconsin Company."

In the Congressional incorporating Act of July 2, 1864, (Statutes-at-Large, 365), in and by Section 10, it was expressly stipulated that no mortgage or construction bonds should ever be issued by the Northern Pacific Railroad Company on its railroad, and that no mortgage or lien should be made by it in any way excepting by the consent of Congress.

In 1866 the control of this Federal company passed to J. Gregory Smith, of Vermont, and his associates. In 1867 Mr. Smith entered into two certain agreements with various other persons. Copies of which are as follows:

WHEREAS, A charter has been granted by the Congress of the United States for a railroad and telegraph line from some point on Lake Superior, in Minnesotaor Wisconsin, to Puget Sound, with the right to construct a branch to Portland, Oregon, under the name of the Northern Pacific Railroad Company, and granting lands to aid in the construction of said road and telegraph, to the amount of ten sections per mile on each side of said road in the States, and of twenty section per mile on each side in the Territories, which said grant of land amounts by estimate to nearly forty-seven millions of acres; and

WHEREAS, The control of said charter and franchise is now in the hands of J. Gregory Smith, of St. Albans, Vermont, and his associates, and whereas said Smith and his associates have paid for the procurement of the charter and other expenses the sum of one hundred and two thousand ($102,000), in cash, exclusive of any

compensation for himself or his associates, and have issued the certificates of indebtedness of the company, bearing interest from March, 1866, for one hundred thousand dollars additional, and have agreed to recognize the stock of the company, issued by the Josiah Perhem, late president of the company, to the amount of $600,000; and

WHEREAS, it is proposed, for the purpose of providing for the early commencement and prosecution of the work of construction of said road and telegraph, to effect an efficient organization of said company, and to procure from Congress additional aid therefor by way of subsidy and such other legislation as may be necessary in the premises; and

WHEREAS, It is proposed, for the purpose of more convenient organization, to divide the said enterprise into twelve shares, to be valued at the rate of $8,500 per shares, now, therefore, for the purpose above set forth, this agreement made and concluded this tenth day of January, A. D. 1867, by and between J. Gregory Smith, of St. Albans, Vermont, acting for himself and associates of the first part, and such persons as may hereafter become subscribers to this agreement, parties of the second part.

WITNESSETH, FIRST:—That each subscriber hereto, party of the second part, shall pay on demand to said Smith, the sum of eighty-five hundred dollars for each one-twelfth part or share in said enterprise, and in

that proportion for any lesser part so by himself subscribed for, and upon payment of said amount, each subscriber aforesaid, shall, and he does hereby become jointly interested with said Smith and his asociates according to the number of shares or parts of shares so subscribed for by him, in the charter and franchise of the Northern Pacific Railroad, with all its right, powers, privileges and immunities.

SECOND:—It is mutually agreed by and between the parties, that the best efforts of each and all shall be given to obtain from Congress the passage of a bill granting aid to the said company for the construction of said road and telegraph, and for such further legislation as may be needed and that each party shall contribute, acording to the interest which he holds, the necessary funds for that purpose, said moneys and expenses to be paid and incurred under the direction of a committee to be appointed for that purpose.

THIRD:—It is further agreed that each share in the enterprise shall be entitled to one director in the company, to be elected at the next annual election of the board, and that in the meantime the vacancies that can now be obtained by the resignation of present members, may be filled by such parties from among the subscribers hereto as may be by them designated.

FOURTH:—That as soon as the necessary legislation from Congress con be obtained, a meeting of the subscribers shall be held at an early day, to make such further organization as may be advisable, with a view to the commencement of the work of construction of said road, and securing the lands granted by the charter.

FIFTH:—Each party hereto may subdivide his interest according to his own choice, the subdivision and addition of new parties, however, not to change the mode and manner of representation in the management as set forth above.

(Stamp)

W. B. Ogden,	1-12 and 1-3 of 1-12.	
Robt. H. Burdell,		1-12
Pres. Erie R. R.		
W. G. Fargo,	)	
D. N. Barney,	)	
B. P. Cheney,	)	
A. H. Barney,	)	2-12
Edward Reilly,		1-12
G. W. Cass,		1-12
J. Edgar Thompson,		1-12

WHEREAS, In a certain agreement of date January 10, 1867, made and executed by J. Gregory Smith, acting for himself and asociates, representing the charter and franchises of the Northern Pacific Railroad Company of the first part and such persons as should become subscribers to said agreement and the conditions thereof, of the second part, the following paragraph is made part of said agreement, to-wit:—

SECOND: It is mutually agreed by and between the parties that the best efforts of each and all shall be given to obtain from Congress the passage of a bill granting aid to the said company for the construction of said road and telegraph, and for such further legislation as may be needed; and that each party shall contribute according to the interest which he holds, the necessary funds for that purpose, said money and expenses to be paid and incurred under the direction of a committee to

be appointed for that purpose; now, therefore, it is further agreed and hereby made a part of said agreement, to which this supplement is to be annexed, that the provisions in said paragrph contained shall be, and are hereby so limited and modified that not over $12,500 shall be assessed or called in on any twelfth part mentioned in said agreement, including in said $12,500, all payments that may have already been made on account of any such twelfth part, without the unanimous consent of those representing the 12 parts named in said agreement.

New York, July 3, 1867.
J. Gregory Smith, for self and asociates, 4 & 2-3 twelfths
W. B. Ogden, 1 and 1-3 twelfths
Robert H. Burdell, Pres't. 1 twelfth.
D. N. Barney,)
B. P. Cheney,) 1 twelfth
A. H. Barney,)
W. G. Fargo,) 1 twelfth
by A.H.Barney,)
Geo. W. Cass, 1 twelfth
J. Edgar Thompson, for self and associates, 1 twelfth
Edward Reilly, 1 twelfth

Under these writings there was established a partnership, the parties thereto undertaking to become jointly interested "in the charter and franchises of the Northern Pacific Railroad with all its rights, powers, privileges and immunities." They claimed to own the "enterprise," which they divided into twelve shares. Subsequently, under terms of two contracts made in 1869 and in 1870 with Jay Cook & Co., Bankers, these twelve interests or shares were increased to twenty-four.

The parties claiming under these various contracts having the control of the original stock of the Federal

Corporation of 1864, called themselves "proprietors" of the Northern Pacific Railroad and also "owners" of the "original interests" therein.

By a joint resolution of March 1, 1869, Congress gave consent to the Northern Pacific Railroad Company issuing its bonds and securing the same by a mortgage upon its railroad ad its telegraph line. This did not seem to cover the land grant and by subsequent resolution of May 31, 1870 (16 Statuates-at-Large, 378), Congress again gave authority to the company to issue its bonds to aid in the construction and equipment of its road and authorized it to secure the same "by mortgage on its property and rights of property of all kinds and description, real, personal and mixed, including its franchises as a corporation."

The resolution of 1870 contained this provision:

> "Provided that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this Act authorized, at the expiration of five years after the completion of the entire road, SHALL BE SUBJECT TO SETTLEMENT AND PREEMPTION LIKE OTHER LANDS at a price to be paid to said company not exceeding two dollars and fifty cents per acre," and it stipulated that in the event of the foreclosure of the mortgage the lands should be sold in single sections or sub-divisions and at public sale AT THE PLACES WHERE SITUATE.

Under this resolution the Northern Pacific Railroad Company on July 1, 1870, executed its authorized mortgage to Jay Cooke and J. Edgar Thompson, as mortgage trustees, providing for an issue of bonds at a rate not to exceed fifty thousand dollars per mile of road. After the company had constructed five hundred

and twenty-nine (529) miles of railroad (four hundred and twenty-four (424) miles in Minnesota and Dakota, and one hundred and five (105) miles in the-then Territory of Washington), it defaulted in the payment of interest on the bonds issued under this mortgage, and in April, 1875, proceedings for the foreclosure of the mortgage were begun in the United States Circuit Court for the Southern District of New York. Under those proceedings a judicial sale was had IN THE CITY OF NEW YORK in August, 1875, under which all the property of the Federal corporation was sold to a committee of bondholders acting under a plan of re-organization.

After this sale the purchasing bondholders, on September 29, 1875, met and organized in the City of New York. They announced that by virtue of said sale and their purchase thereunder "we became the body politic and corporate known as the Northern Pacific Railroad Company and in that name, we and our associates will be clothed with all the powers, rights, liberties, franchises, etc., of said corporation."

REPORT

Made By

THE PURCHASING COMMITTEE

September 29, 1875.

FIRST MEETING OF PREFERRED STOCKHOLDERS AND REPORT OF PURCHASING COMMITTEE,

September 29th, 1875.

Meeting of the Preferred Stockholders of the Northern Pacific Railroad Company, held pursuant to advertised notice, on the 29th day of September, 1875.

(ABSTRACT FROM THE RECORDS)

There were present at this meeting, Messrs. Johnston Livingston, Frederick Billings, George Stark, James K. Moorehead, John N. Hutchinson, and John M. Denison, the Committee appointed by the Bondholders of the Northern Pacific Railroad Company, to purchase the same and all its property and franchises, under the "Plan" adopted June 30th, 1875, and others associated with them as such Preferred Stockholders, by having as Bondholders, assented to and complied with the Plan.

Mr. Johnston Livingston called the meeting to order.

Mr. Joseph Dilworth, of Pittsburg, Penn., was elected Chairman of the meeting.

Mr. D. E. Small, of York, Penn., was elected Secretary.

The Secretary read the call for the meeting in the following words:

TO THE BONDHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY:

On the 12th instant, the undersigned, your Committee, purchased at judicial sale under the decree of the Circuit Court of the United States for the Southern District of New York, all the property of the Northern Pacific Railroad Company (except the patented and the certified lands), together with all its rights, liberties and franchises, including the franchise to be a corporation, as described in the decree; which sale was, on the 25th day of August instant, confirmed by the Court.

Upon the execution and delivery to us of the deeds of the property and franchises so purchased, under said sale and confirmation, we became the body politic and corporate known as the Northern Pacific Railroad Company, and in that name we and our associates will be

clothed with all the powers, rights, liberties and franchises of said corporation, including the franchise to be a corporation.

Now, in order to accomplish the purpose of our appointment and of the "plan" adopted by the Bondholders on the 30th day of June, 1875, you, who have, or then shall have, surrendered your bonds in payment for Preferred Stock, are hereby notified to meet, in person or by proxy, at the office of the Company, No. 23 Fifth Avenue, in the City of New York, on Wednesday, the 29th day of September, 1875, at 12 o'clock noon, to elect a Board of Directors to serve for such time as the by-laws you may then approve shall provide; and to transact any other appropriate business.

Holders of receipts of the Farmers' Loan and Trust Company of New York, for surrendered bonds, will, on production of such receipts, be entitled to vote in person or by proxy at said meeting, and until formal certificates of preferred stock are issued.

Holders of common stock have not the right to vote until on and after July 1st, 1878.

Signed by the Committee, and attested by the Secretary of the N. P. R. R.

New York, No. 23 Fifth Avenue,

August 27th, 1875.

The Secretary then read an affidavit that the above call had been duly published.

Mr. Stark presented and read the following Report of the Purchasing Committee to the Stockholders:

TO THE STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY:

The undersigned, a Committee chosen by the Bondholders of the Company at their general meeting, held in

the city of New York, on the 30th day of Jun last, "to attend the sale of the railroad and other property of the Company, with a view to purchase the same, and take title therefor, for the benefit of all the parties assenting to, and complying with the conditions of the plan of reorganization; to assume the management of the railroad and property when they shall have acquired title thereto; to attend to the issuing of bonds and stocks, perfecting title, and generally to do all things necessary for the complete execution of the plan, and to place the railroad and property again under the control and management of a Board of Directors, to be elected hereafter by the Preferred Stockholders," having attended to the duties assigned to them, beg leave to report their proceedings to date.

The foreclosure of your Mortgage was initiated on the 16th of April last, in the United States Circuit Court, and a Receiver was thereupon appointed; and in conformity to subsequent decrees of the Court, "all the property of the Northern Pacific Railroad Company (except the patented and certified lands) together with all its rights, liberties and franchises, including the franchise to be a corporation," was put up at auction, on the 12th day of August last, and was purchased by us for the sum of one hundred thousand dollars, and on the 25th day of August last, the sale was confirmed by the Court. The preparation of the deeds of the property and franchises so purchased, and the papers incident thereto, under such sale and confirmation, has been attended to with great care, under the advice of experienced counsel, and their final execution has been delayed until now. We have this morning come into full possession of the property purchased on your behalf, and we propose to immediately place it under the control and management of the Directors you are assembled to elect.

The patented and certified lands of the Company remaining unsold, amount to about six hundred thousand acres, all in Minnesota and Dakota. Their sale is postponed to such future day as the Court may hereafter order. The decree for their sale provides that five per cent of their purchase money shall be paid in cash, and the balance may be paid in the First Mortgage Bonds of this Company. To enable us to act efficiently in your behalf when such sale shall occur, and for the purpose of securing to the Bondholders in general the full benefit of the entire property of the Company under the foreclosure, the Committee, acting under the advice of counsel, has caused the surrendered Bonds to remain in the hands of the Farmers' Loan and Trust Company, subject to the control of the Committee, for such further use as the interests of the Bondholders may demand.

In compliance with our "Call," issued on the 12th of August last, bonds have been deposited with the Farmers' Loan and Trust Company for exchange into Preferred Stock, and for otherwise carrying on the objects of the Plan of re-organization, amounting to this date, to about twenty millions of dollars. Large daily additions are being made, and we have assured reason to expect, that nearly all will eventually come in. No time has yet been fixed limiting their reception. The Committee feel inclined to make the time ample for all reasonable emergencies, but would advise holders to send in their Bonds at the earliest practicable time.

The Powers of Attorney received by, and authorizing the Committee to carry out the "Plan" of re-organization, foot up about twenty-six millions of dollars, or more than five-sixths of the whole, and large additions are being made daily. Without doubt, the balance will come forward, as little or no cash dividend can be expected by any who may stand out.

In transferring the Railroad properties acquired, to the management of your Directors, we take occasion to congratulate you upon the rapid success with which we have been enabled to carry out thus far the purposes of our appointment, and to thank you for the confidence you have shown in us by promptly responding to our calls for your Powers of Attorney and the surrender of your Bonds. It augures well for the ultimate success of your magnificent enterprise, that your confidence and unanimty have enabled a mortgage of thirty millions to be substantially foreclosed, and a re-organization completed, in less than six months from the initiatory step, without any of the usual attendant and consequent litigation.

You have now 550 miles of road in paying operation, substantially free from debt, and an attaching domain of nearly ten million acres of land. With this immense extent of unencumbered property as a basis for future operations, and the twenty-five thousand and odd acres to be added for every mile of new road built, there ought to be little doubt of your ability to secure means for the early resumption of work in the extension and completion of the Road.

New York, September 29th, 1875.

Signed by the Committee.

On motion of Mr. Lewis, the report of the Purchasing Committee was accepted and ordered to be placed on the minutes of the meeting.

A body of By-Laws which had been adopted by the Purchasing Committee, for the government of the Northern Pacific Railroad Company, was presented and read to the meeting.

On motion of Mr. Tower, it was resolved that the meeting approve the action of the Purchasing Committee in adopting the By-Laws.

On motion of Mr. Thaw, Francis, Jordan, of Harrisburg, Penn., James B. Williams, of Stanford, Conn., and Joseph D. Potts, of Pittsburg, Penn., were chosen inspectors of the election for Directors this day to be held.

The polls were ordered to be kept open for three hours.

A recess was ordered, to enable the Inspectors to assort and count the ballots.

Sept. 30, 1875, 10 o'clock A. M.

The recess having expired, the stockholders reassembled in meeting.

The Inspectors of election reported—that the voting at said election was by ballot, one vote for each share of said Preferred Stock, that the whole number of votes cast by said Preferred Stockholders, was one hundred and eleven thousand two hundred and fifty-two, and that the following named gentlemen, stockholders in the Corporation and duly qualified, were elected Directors of the Northern Pacific Railroad Company, viz:

EDWIN M. LEWIS, GEORGE W. CASS
JOHNSTON LIVINGSTON, CHAS B. WRIGHT,
J. K. MOOREHEAD, JOSEPH DILWORTH,
JOHN N. HUTCHINSON, B. P. CHENEY,
GEORGE STARK, CHARLEMAGNE TOWER,
JOHN M. DENISON, FREDERICK BILLINGS,
J. FRAILEY SMITH.

The report of the Inspectors was accepted and adopted, the Directors were duly notified of their election, and the meeting adjourned sine die.

The purchasers thus claimed to have acquired at foreclosure sale the prerogative TO BE a corporation.

At the time, however, even in the minds of those making the claim, there was doubt sufficient to prompt them to ask for Congressional ratification. Early in 1878 a bill was introduced in Congress to secure to this re-organized company confirmation of title to the property and to all the corporate powers and franchises, "including the franchise to be a corporation," originally conferred upon the Northern Pacific Railroad Company by its Federal charter of 1864.

That bill failed of passage. It was never again introduced. A record of the proceeding will be found in the Congressional Record of the 45th Congress, Volume 7, part 3, pages 2690, etc.

Subsequently, the Supreme Court of the United States, in an opinion delivered in 1884, in the case of Memphis & Little Rock R. R. Co. v. the Railroad Commissioners, 112 U. S., 609, made it clear that such claim of the purchasing bondholders was erroneous. The Court there held that "The franchise TO BE a corporation," is wholly distinct from "a franchise as a corporation to maintain and operate a railway," that the franchise TO BE a corporation is not a subject of sale and transfer unless made so by Statute WHICH PROVIDES A MODE FOR EXERCISING IT, and further that A MORTGAGE OF THE "CHARTER" OF A CORPORATION MADE IN THE EXERCISE OF THE POWER GIVEN BY STATUTE CONFERS NO RIGHT UPON PURCHASERS AT A FORECLOSURE SALE TO EXIST AS THE SAME CORPORATION! The Court said, INTER ALIA, "The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such, are the franchises of the corporation. THE LATTER HAS NO POWER TO DISPOSE OF THE FRANCHISE OF ITS MEMBERS

which may survive in the mere fact of corporate existence after the corporation has parted with all its property and all its franchises.

In no event could the purchasing bondholders of 1875 thus acquire by foreclosure sale the prerogative franchise "to be the Federal corporation." Moreover, the United States Circuit Court for the New York district was wholly without jurisdiction in the proceedings of 1875. The proceedings were IN REM. They were for the foreclosure of a mortgage—for the enforcement of a lien upon a railroad and lands, no part of which were situate within the territorial jurisdiction of the Court. A sale was prayed for. The record itself discloses that no part of the RES was within the jurisdiction of the Court. In the Western States and Territories in which the railroad and lands were located, a mortgage has always been held as not conveying any estate or title to the mortgagee, but as simply creating a lien. Where a mortgage is considered as merely creating a lien, an action to foreclose it is always a LOCAL action, inasmuch as the decree operates upon the title. It is elementary that a Court in one State is without jurisdiction to decree a lien upon lands or land interests in another State or to enforce such lien by a sale under its decree.

In actions purely PERSONAL, consent may at times give jurisdiction, but IN REM consent can never confer upon a court jurisdiction over the RES—over lands or land interests, if such RES be not actually within its jurisdiction.

The judgment of the United States Circuit Court in 1875 was therefore utterly void, and the sale thereunder transmitted no title to either the property or to the franchise to be a corporation. Whether the sale operated

as an equitable assignment of the mortgage is a question not necessary to now discuss. The purchasers of 1875, however, did acquire all the bonds and all the obligations of the original Federal Company from the creditors and they acquired from the stockholders, the so-called "Proprietors" and holders of "Original Interests," all such original stock of the Federal corporation as had been issued. THOSE SHARES OF STOCK AND THOSE OBLIGATIONS IT HELD AS ITS MUNIMENTS OF TITLE TO THE PROPERTY.

The proceedings of 1875 did not result in a disolution of the Federal corporation, but did result in the formation of a new organization, a voluntary body, an organization of bondholders, calling themselves by the original ttitle—"Northern Pacific Railroad Company."

This bondholders' organization of 1875 was NOT a Federal corporation, for two corporations could not co-exist under the Congressional Charter Act. There was no general Federal legislation under which it could claim corporate existence. It was, therefore, neither DE JURE NOR DE FACTO a Federal corporation, and it never claimed to be a State corporation. What then was it? What could it be other than a partnership association or a joint stock company?

We have, then, at this stage, two organizations, one the Federal Corporation of 1864, and the other the organization of 1875, WHICH WAS NOT A FEDERAL CORPORATION.

At this point I direct attention to the fallacy in the opinion of Attorney General Harmon, reported in Volume 21 of the Opinions of Attorney General at page 486. THAT OFFICIAL COMPLETELY OVERLOOKED

THE REORGANIZATION OF 1875, AND ERRONEOUSLY ASSUMED THAT THE LAST REORGANIZATION OF 1896 WAS UNDER A FORECLOSURE OF MORTGAGE EXECUTED BY THE FEDERAL CORPORATION OF 1864. The Court proceedings of 1896 were based, NOT upon mortgages or obligations created by the Federal Corporation of 1864, but WERE UPON MORTGAGES AND OBLIGATIONS CREATED BY THE ORGANIZATION OF 1875.

The organization of 1875 owned all the stock and obligations of the Federal Corporation of 1864, BUT IT WAS NOT THE FEDERAL CORPORATION, and it had no authority to mortgage the property itself for two reasons: First, because Congress had not consented to such mortgaging; Second, because the title to the property itself was in the Federal Corporation of 1864, no valid judicial sale having divested the Federal Corporation of the title. When, therefore, the judicial proceedings in this last reorganization of 1896 were pending, a plea was filed on behalf of the Wisconsin Central Company, a creditor, alleging that the mortgages sought to be foreclosed were invalid, because Congress had not sanctioned their execution, and averring that the only mortgage Congress had ever authorized was one which had been foreclosed and discharged in 1875.

THE ISSUE RAISED BY THIS PLEA WAS NEVER DISPOSED OF BY THE COURT, AND IT REMAINS UNDISPOSED OF TO THIS DAY. In the decree of sale the Court expressly provided that the issue raised by the plea of the Wisconsin Central Company as to the validity of the mortgages should be reserved and that the purchaser should buy subject to such reservation. It was anomalous to decree a foreclosure and sale, and at the same time to reserve for determination a question vital to the foreclosure itself.

Those in charge of the reorganization of 1896 knew of all these facts. They knew that the organization of 1875 was not a Federal corporation and they knew that unless it was a Federal corporation the United States Circuit Court in Wisconsin, in which the proceedings were being had, WAS WITHOUT JURISDICTION OF THE CAUSE. Knowing these things they realized that it would not be safe and that it would not do to depend upon the foreclosure sales to effect this last reorganization. What then did they do? They formulated a plan of reorganization with J. P. Morgan and Company as reorganization managers, calling for deposits of the stocks and bonds of the organization of 1875, termed "The Northern Pacific Railroad Company." It was provided by this reorganization agreement that each depositing bondholder or stockholder "sold and assigned" his bonds and stock to the reorganization managers who were expressly vested with all the rights and powers of owners in respect to the same. None of the stockholders but those who "sold" and "assigned" to Morgan and Company, reorganization managers, were to be permitted to "buy" new stock from the managers for syndicate account.

At page eight (8) of this reorganization plan and agreement it is said, "At the discretion of the managers, the various properties will be sold under one or more of the several mortgages in default OR OTHERWISE DEALT WITH. The property was "otherwise dealt with." The compensation of the managers was to be based "upon the par value of the securities deposited under the plan and of the new securities issued IN EXCHANGE thereof." It was an "exchange of securities" that was provided for. In paragraph fifth of the reorganization agreement the managers were authorized to proceed WITH OR WITHOUT FORECLOSURE,

and it is therein stipulated that all the provisions of the plan and agreement "shall equally apply to and in respect of any PHYSICAL PROPERTIES embraced under the reorganization and to and in respect of any SECURITIES representing any such properties, IT BEING INTENDED THAT FOR ALL PURPOSES THEREUNDER ANY SUCH PROPERTY AND ANY SECURITY REPRESENTING SUCH PROPERTY MAY BE TREATED OR ACCEPTD BY THE MANAGERS AS SUBSTANTIALLY IDENTICAL." The "securities" were to be deemed and treated as identical with the "property" or estate itself, and were so treated.

Contemporaneously with the announcement of the reorganization plan there was made and entered into by the reorganization managers a syndicate agreement with THEMSELVES as syndicate managers and with THEMSELVES and others as SYNDICATE SUBSCRIBERS purporting to sell one hundred and five millions two hundred and fifteen thousand seven hundred and five dollars ($105,215,705) par value of new stock and bonds for nineteen millions eight hundred and thirty dollars ($19,873,830). Seventy seven millions five hundred thousand dollars $(77,500,000) of such new securities were in the shape of common stock, and exactly ONE-THIRD OF THIS WHOLE AMOUNT, or twenty-five millions eight hundred and thirty four thousand dollars (25,834,000) par, went to James J. Hill and his associates of the Great Northern Railroad for four millions one hundred thousand dollars ($4,100,000) as was pointed out by Attorney General Knox in the Northern Security case.

The so-called "judicial sales" of 1896, under which the Wisconsin Company became a purchaser, took place on July 25, 1896, and on subsequent dates. TWELVE

DAYS PRIOR TO THE JUDICIAL SALES, to-wit: On July 13th, 1896, the Wisconsin Company entered into an agreement with J. P. Morgan and Company, re-organization managers, for the purchase of the stocks, bonds and securities deposited with or acquired by them, and for the acquisition of the Northern Pacific Estate, FIXING THE VALUE OF THAT ESTATE AT THREE HUNDRED AND FORTY-FIVE MILLIONS OF DOLLARS ($345,000,000). A copy of said agreement is now produced:

THIS AGREEMENT, Made the 13th day of July, eighteen hundred and ninety-six, by and between Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin (hereinafter called the "Company") party of the first part; and J. P. Morgan & Co., a co-partnership, of the City of New York (hereinafter called the "Re-organization Managers"), party of the second part, WITNESSETH AS FOLLOWS:

WHEREAS, The Re-organization Managers have been engaged and are now engaged in carrying out a plan of reorganization of the Northern Pacific Railroad system, pursuant to a certain plan and agreement dated March 16, 1896, of which a copy is hereto annexed, marked "Schedule A," reference thereto being made as though the same were herein fully set forth:

AND WHEREAS, The Company composed exclusively of citizens of and residents in the United States of America, has been duly organized and is in existence by and under the laws of the State of Wisconsin, and has complied with all the provisions of law so as to enable it to transact business as a railroad company in the several States of Wisconsin, Minnesota, North Dakota, Montana,

Idaho, Washington and Oregon, and it is intended that as such railroad corporation, it shall acquire the railroad, property and franchises, including the land grant of the Northern Pacific Railroad Company, in each and all of said several States, by becoming the purchaser thereof at the foreclosure sales to be had in pursuance of the several decrees of foreclosure and sale entered by the Circuit Court of the United States for the Eastern District of Wisconsin on April 27, and April 28, 1896, in a certain consolidated cause in equity, pending in said Court, wherein The Farmers' Loan and Trust Company is complainant and the Northern Pacific Railroad Company and others are defendants, and certain decrees and orders ancillary thereto entered in causes pending between said parties in the Circuit Courts of the United States for the several other districts of the States above mentioned.

AND WHEREAS, In pursuance of the provisions of said plan and agreement dated March 16, 1896, the Re-organization Managers have acquired, and expect from time to time hereafter to acquire, the title to the property, franchises, stocks or bonds of all or most of the several corporations mentioned in said plan and agreement, and desire to vest the ownership thereof in the company for and as the new Railroad Company, successor to the Northern Pacific Railroad Company, contemplated in the said plan and agreement;

AND WHEREAS, The right, title and interest in the bonds, stocks, property or franchises of the Northern Pacific Railroad Company, and the several subordinate corporations mentioned in said plan and agreement, heretofore vested in the Re-organization Managers, are by the mutual agreement of the parties hereto of the full

value of $345,000,000 payable in the fully paid and non-assessable stock, and of the prior lien and general lien bonds of the Company, to be executed and delivered as hereinafter provided, to-wit:

(a) Preferred Stock $75,000,000
(b) Common Stock 80,000,000
(c) Prior Lien Bonds.....130,000,000
(d) General Lien Bonds 60,000,000

the amount of such bonds (either prior lien or general lien) to be received hereunder being subject to resrvation and diminution as from time to time hereafter shall be determined by mutual agreement of the parties to be necessary to provide for the acquisition or retirement of outstanding bonds of the Northern Pacific Railroad Company or of any division thereof, or of any subordinate or constitutent company, or for the provision for betterments or for any other object within the scope and purpose of the said plan and agreement, as finally carried out.

NOW, THEREFORE, In pursuance of such plan and agreement hereunto annexed and in consideration of the premises and of the mutual promises and agreements hereinafter contained the said parties do hereby promise and agree as follows, to-wit:

First: The Company will forthwith issue and deliver to the Re-organization Managers, or upon their order, certificates for 750,000 shares of its fully paid and non-assessable preferred stock and 800,000 shares of its fully paid and non-assessable common stock of the character described in such plan of re-organization.

Second: The Company will forthwith make and execute, and cause to be recorded, its mortgage securing

an issue of $130,000,000 of its prior lien bonds and $190,000,000 of its general lien bonds; and will make and execute, and cause to be certified and delivered, to the Re-organization Managers such prior lien bonds, and such general lien bonds, subject to diminution or reservation as hereinbefore stated, all of the character described in such plan of re-organization.

Third: The Company from time to time hereafter will make and perform any agreements which the Re-organization Managers may require, and will adopt and will perform any and all agreements which may have been made or which may be made by the Re-organization Managers with respect to the issue of the securities of the company, as provided in said plan and agreement. The Company, upon demand of the Re-organization Managers, will assume and satisfy all obligations and liabilities of the Re-organization Managers in connection with such sale and purchase of the property of the Northern Pacific Railroad Company, or with the re-organization under said plan and agreement, or any modification thereof, or with the acquisition of stocks or bonds necessary or desirable to acquire in connection with, or as part of, such re-organization.

Fourth: The Company, upon the request of the Re-organization Managers, will at all times and in all ways do and perform any and all acts, and execute and deliver any and all writings, suitable to carry fully into effect the said plan and agreement according to the terms and intention thereof, subject to all such modifications as from time to time may be made in pursuance of the terms thereof, including in this covenant all such purchases, consolidations, lease, contracts or other acquisitions of

rights in or in the operation of any railroad or transportation Company as from time to time may become necessary or proper in the full performance of the said plan and agreement.

Fifth: The Company, from time to time, on demand of the Re-organization Managers, will pay to the order of the Re-organization Managers all such sums as they or any of the members thereof shall have incurred or may hereafter incur for expenses in and about the performance of such agreement and plan of re-organization, and will indemnify and hold harmless the Re-organization Managers, and each member thereof, from and against all costs, expenses, liabilities and charges whatsoever incurred or which may be incurred by the Re-organization Managers, or members thereof, in carrying out such plan and agreement of re-organization, or by reason of any acts done or suffered to be done thereunder.

Sixth: The Re-organization Managers from time to time will vest or cause to be vested in the Company *the ownership of the stocks, bonds or other property representing the system formerly of the Northern Pacific Railroad Company* so far as the same shall have been acquired by the Re-organization Managaers in the performance of said plan and agreement of re-organization, and also any balance of cash received by the Re-organization Managers for the purpose of carrying out such plan and agreement, except so far as such stocks, bonds and other property may be converted or otherwise dealt with, and said cash be expended, by the Re-organization Managers in effecting any of the purposes of said plan and agreement; it being the intention of this agreement and of the parties heretofore that the Company shall become and be the suitable agency contemplated in the

said plan and agreement for the ownership and operation of the properties acquired and to be acquired pursuant to said plan and agreement, and that on the one hand all of the stock of the Company, and also its bonds to the extent above set out, shall be fully and effectually vested in said Reorganization Managers, and on the other hand the securities and properties heretofore or hereafter received under the said agreement by the Reorganization Managers shall be vested in the said Company as contemplated in said plan and agreement.

Seventh: From time to time the Company and the Reorganization Managers will, in all particulars, co-operate with each other, and will assist each other in carrying this agreement into effect, and in accomplishing the purposes of the said plan and agreement or reorganization as now existing or as from time to time modified, in pursuance of the provisions thereof; and if for any reason it shall at any time become impracticable for the Company to execute or to perform any part or provision of such plan or agreement or reorganization, then and in that case the Reorganization Managers may select any other suitable agency or method for such performance, and, upon the happening of any such contingency, the securities or property received or created by the Reorganization Managers under such modification shall be accepted by the Company in lieu and in substitution of any existing securities or property embraced within the purview of this agreement, at the value of the porperty represented by such new securities.

Eighth: This agreement is made upon the condition that the Reorganization Managers reserve unimpaired all rights and powers under said plan and agreement, that the Reorganization Managers may construe

said plan and that its construction thereof shall be conclusive, and that it may supply any defect or omission.

It is further agreed that the Reorganization Managers may from time to time in its discretion alter or modify said plan and agreement within the limits therein authorized and that in case of any such alteration or modification this agreement shall apply to the altered or modified plan and agreement in all respects as though the same were in force at the present time.

Ninth: This agreement, and each and every provision thereof, may, at any and all times, be modified, extended or enlarged by the agreement of the Reorganization Managers, on the one side and the President or First Vice President of the Company on the other.

IN WITNESS WHEREOF, The Company, by the authority of its Board of Directors, each and every of its stockholders consenting thereto has caused these presents to be executed and delivered by its President under its corporate seal, attested by its Secretary, and the Reorganization Managers have hereunto set their hands and seals the day and year first above mentioned.

Northern Pacific Railway Company,

(L. S.) By Edward D. Adams,

President.

Attest:

George H. Gardiner,
Secretary.

In Presence of

J. P. Morgan & Co.
Reorganization Managers.

The undersigned, stockholders of the Northern Pacific Railway Company, hereby assent to and approve of

the foregoing agreement.

C. H. Coster	Edward D. Adams
Francis Lynde Stetson	Charles F. Coaney
	By Edward D. Adams, Atty.
W. Paxton Little	Victor Morawitz
Mortimor F. Smith	Geo. H. Gardiner
A. H. Gillard	J. W. Almy, Jr.

This valuation was ONE HUNDRED AND FIFTY-FIVE MILLIONS OF DOLLARS ($155,000,000) IN EXCESS OF THE ENTIRE INDEBTEDNESS of the Northern Pacific Railroad on July 1, 1896, as shown by its report filed with the Secretary of the Interior and is MORE THAN SEVENTY MILLIONS OF DOLLARS ($70,000,000) IN EXCESS OF ALL THE STOCK AND ALL THE INDEBTEDNESS AND LIABILITIES WHATSOEVER of the so-called insolvent Northern Pacific Railroad Company as of July 1, 1896, as shown by said report filed in the Department of the Interior.

On the SAME DATE, JULY 13, 1896, the officers of the Wisconsin Company made oath to a statement filed with the Secretary of State of Montana with the pending resolution:

COPY OF STATEMENT

FILED IN MONTANA, JULY, 1896.

The Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, intending to acquire, maintain and operate railroads within the State of Montana, and to transact business in said State, complying with Section 1030 of the Civil Code of said State for 1895, hereby makes, as required by said section, the following statement:

1. The name of this corporation is Northern Pa- i ficcRailway Company, organized and existing under the laws of the State of Wisconsin; location of principal office or place of business of this corporation, without the State of Montana, is at the city of St. Paul, Ramsey County, Minnesota, and its principal office in the State of Montana will be at Helena.

2. The amount of its capital stock is one hundred fifty-five millions of dollars, divided into shares of one hundred dollars each, the aggregate of which seventy-five million dollars are preferred stock and eighty million dollars are common stock.

3. The amount of its capital stock actually paid in in money is $4,300.

4. The amount of its capital stock paid in otherwise than in cash is $154,995,700, *and the same was paid bonds and securities formerly of or belonging to the Northern Pacific Railroad Company, or of interest therein.*

5. The amount of the assets of the corporation is $4,100 in cash. *and the stocks, bonds and securities before mentioned, of or formerly belonging to the Northern Pacific Railroad Company, to an aggregate amount of which the actual cash value exceeds* $40,000,000.

6. The liabilities of such corporation are such as have been incurred for and in connection with the purchase of the property of the said Northern Pacific Railroad Company; and while not yet specifically formulated, an indebtedness equal to or not exceeding the sum of $190,000,000 has been or will be created by the said corporation, all of which will be secured by mortgages upon the property, franchises and railroads now or formerly of the Northern Pacific Railroad Company.

CITY OF NEW YORK
County of New York ss.
State of New York

In attestation of the truth of the foregoing statement, we, the undersigned, constituting a majority of the Board of Directors of the Northern Pacific Railway Company, have hereunto set our hands this 13th day of July, A. D. 1896.

EDWARD D. ADAMS, GEORGE H. GARDINER,
A. H. GILLARD, W. PAXTON LITTLE,
MORTIMER F. SMITH, J. W. ALMY, Jr.,
VICTOR MORAWITZ, FRANCIS LYNDE STETSON.

CITY OF NEW YORK
County of New York ss.
State of New York

EDWARD D. ADAMS, President, and GEORGE H. GARDINER, Secretary of the Northern Pacific Railway Company, a corporation, which makes the foregoing statement, each being first duly sworn upon his oath, says that he has read the foregoing statement, and that the same is true, and said affiants further say that the above signatures of Directors are genuine and that the signers constitute a majority of the Board of Directors of the corporation.

Subscribed and sworn to before me this 13th day of July, A. D. 1896.

EDWARD D. ADAMS,
GEORGE H. GARDINER.

In witness whereof, I have hereunto set my hand and

affixed my official seal the day and year last above written.

JOSEPH B. BRAMAN,
Commissioner of Deeds for the State of Montana in and for the State of New York resident in said city of New York.

(Commissioner's Seal.)

In that statement, made and filed PRIOR TO THE FORECLOSURE SALES, it was certified that all the stock of the Wisconsin Company—one hundred and fifty-five millions of dollars ($155,000,000)—par value had been issued, forty-three hundred dollars ($4,300) thereof for cash and that one hundred and fifty-four millions nine hundred and ninety-five thousand seven hundred dollars ($154,985,700) "was paid in BY THE SALE AND TRANSFER TO THE COMPANY OF STOCKS, BONDS AND SECURITIES FORMERLY OF OR BELONGING TO THE NORTHERN PACIFIC RAILROAD COMPANY, OR OF INTERESTS THEREIN." These securities or "interests" were certified in the statement to have a cash value exceeding forty millions of dollars.

These facts carry to mind the conviction that such "interest" in this property or estate as is held by the Wisconsin Company has been and is obtained, not by the so-called foreclosure sales, but by its acquisition of the securities of the organization of 1875, which later organization had in the first instance acquired the stocks and securities of the original Federal corporation as its basis of ownership or interest, and that the legal title to the property and estae itself remains in this Federal corporation.

In passing, I desire to call attention to the fact that the Wisconsin Company, in 1873, then called the Superior and St. Croix Railroad Company, issued, in the name of the Northern Pacific Railroad Company, thirty-eight hundred (3800) shares of its capital stock, and that, claiming to be the majority stockholders of the Wisconsin Company and claiming ownership of such thirty-eight hundred (3800) shares out of a total issue of thirty-eight hundred and forty-three (3843) shares, the Northern Pacific Railroad Company, the Federal Corporation of 1864, in the first instance, and subsequently the organization of 1875 down to the time of the last reorganization or its preliminaries, actually controlled this Wisconsin Company which now claims to have acquired the Northern Pacific Estate.

This is another of the many peculiar and remarkable facts connected with the Northern Pacific reorganization

In legislating as to the land grant, by act of July 1, 1898, (30 Statutes-at-Large, Chapter 546, pages 620 and 621), Congress was careful to refuse to recognize the Wisconsin Company as the lawful successor of the Northern Pacific Railroad Company and to expressly stipulate that such question of successorship should be left as an open one for determination when raised.

I have already pointed out the error of fact into which Attorney General Harmon fell when he over-looked the earlier reorganization of 1875.

The error in Attorney General Moody's opinion is entirely overlooking THE RIGHTS OF THE GOVERNMENT and in ignoring the fact that the Court proceedings in 1896, to which the Government was not a party, are in no way binding upon the Government.

In his opinion, addressed to the Secretary of the Interior (Vol. 25, Opinions of Attorneys-General, p. 401), Attorney General Moody uses the language in referring to the organization of 1875, whose mortgages were foreclosed in 1896:

> "It is urged that the reorganized Northern Pacific Railroad Company was not a corporation existing by virtue of an act of Congress or otherwise, the contention being that the foreclosure and sale of the franchise as a corporation of the original company did not IPSO FACTO confer corporate capacity upon the purchasers. The case of Memphis & Little Rock Railroad Company v. Commissioners (112 U. S., 609), is cited in support of this proposition. Your second question, therefore, is whether the Court was without jurisdiction of the foreclosure proceedings in 1886, and whether its decree should consequently be treated as void and of no effect, for the reason that it was not a suit arising under the laws of the United States.
>
> "After a careful examination of the reported proceedings in this connection, and of the authorities upon the subject, it seems to me REASONABLY clear that the Wisconsin Court had jurisdiction of the suit in question. In any event, Jurisdiction AFFIRMATIVELY APPEARED of record, and in view of the well settled rule with reference to collateral attack upon decrees BY THOSE WHO ARE PARTIES TO THE PROCEEDING, I have no hesitation in saying that this final adjudication of the matter cannot be treated by them as a nullity."

No one for a moment doubted the rule that parties to a proceeding cannot indulge in collateral attack upon the record of the proceeding, but IT WAS BECAUSE

THE GOVERNMENT WAS NOT A PARTY TO THE RECORD, BECAUSE IT WAS NOT A PARTY TO THE PROCEEDING AND WAS NOT BOUND BY IT IN ANY WAY; THAT GOVERNMENT OFFICIALS WERE ASKED TO INTERVENE AND TO ACT IN SECURING REDRESS FOR THE PUBLIC WRONGS INVOLVED.

In the leading case of Thompson vs. Whitman, 18 Wallace, 457, the Supreme Court of the United States expressly decided that the record of a judgment may be contradicted as to the facts necessary to give the Court jurisdiction and that if it be shown that such facts did NOT exist THE RECORD WILL BE A NULLITY NOTWITHSTANDING IT MAY RECITE THAT THEY DID EXIST. This decision has been followed again and again in both Federal and State courts. If the organization of 1875 was not a Federal corporation, THE UNTRUE AFFIRMANCE UPON THE RECORD THAT IT WAS SUCH A FEDERAL CORPORATION, DOES NOT BIND THE GOVERNMENT.

In this matter it is of public concern that it should be ascertained whether the railroad and the lands granted from the public domain are owned by a corporation created by Congress and OVER WHICH CONGRESS HAS DIRECT LEGISLATIVE POWER, or whether there has been such a transformation, through re-organization, that the legal title has passed to a State corporation free forever from the direct legislative power of Congress.

It is a matter of public concern whether the obligations imposed by Congress in connection with the property are still enforceable or whether they have been rendered unenforceable by virtue of valid foreclosure sales, as has already been set up in defence against the Government by the Wisconsin Company.

It is a matter of public concern whether the trust impressed by Congress upon the lands by the joint resolution of 1870 is of present effect. As expressly recited in the Act of 1864 the lands were donated to the Federal corporation FOR THE SPECIFIC PURPOSE OF AIDING IN THE CONSTRUCTION OF THE RAILROAD. WHEN THAT PURPOSE WAS SERVED IT WAS INTENDED THAT SETTLERS UNDER THE LAND LAWS OF THE UNITED STATES SHOULD HAVE THE BENEFIT OF THE LANDS. It was, therefore, provided in the resolution of 1870, authorizing the Jay Cooke mortgage, that all lands granted to the company not sold or disposed of or remaining subject to that mortgage should, at the expiration of five years after the completion of the entire road, "BE SUBJECT TO SETTLEMENT AND PRE-EMPTION LIKE OTHER LANDS" at a price to be paid the company, not exceeding two dollars and fifty cents per acre! Whether this provision applies to the lands in place—or to the lands within the indemnity belt referred to in the resolution of 1870, it is a matter directly concerning the Government, and it is a matter seriously affecting the interests of the people in the Western States. The mortgage referred to in the resolution was foreclosed in 1875, more than a quarter of a century ago, and the railroad itself has been completed for more than twenty years, yet the patents have been issued and continue to be issued to the Wisconsin Company, which disposes of the lands regardless of any such rights of settlement or pre-emption upon the part of the public.

Inquiry as to whether Congress still has the right to legislate directly upon the corporation in the ownership of this great trans-continental line, which was

built under the direction of Congress and with Government aid to serve national purposes, and inquiry as to whether the Federal corporation exists and continues to exercise the functions for which it was created or whether it has ceased to exercise those functions, would seem to be proper under the circumstances.

STATEMENT OF THE CASE

This controversy is in respect to the title to the South East Quarter of Section Twenty-one, Township Fifty-four, North Range Twelve, West, of the Fourth Principal Meridian, within the Duluth land district, in Minnesota. The land in controversy is within the second indemnity limits of the Northern Pacific Railroad Company, East of Duluth, and embraced within the preliminary selection of said railroad company on its list dated October 17, 1883, for the purpose of indemnifying said company for the loss of the South East Quarter of Section Nine, Township One hundred thirty-three, North-Range Thirty-four, West. The selection was made under the authority of the joint resolution dated May 31, 1870, (16 Sta. 378) entitled "A Resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes."

The land claimed to be lost, is situated on the South side of the line of the Northern Pacific Railroad Company, while the land in controversy, is north of said railroad line.

The defendants, claim title under and by virtue of a conveyance from the Northern Pacific Railway Company, the pretended successor of the Northern Pacific Railroad Company; the Secretary of the Interior, on November 7, 1905, (See Record P. 82), having approved

the selection of the Northern Pacific Railroad Company of the land in controversy made October 17, 1883, and the same was patented to the Northern Pacific Railway Company November 13, 1905. (See Record P. 89).

The title of the plaintiff rests on the following facts: On the 26th day of October, 1895, the plaintiff being over the age of 21 years, and in all respects duly qualified to enter land, desiring to avail himself of the provisions of the Act of Congress entitled, "An Act for the sale of timber lands in the States of California, Oregon, Nevada and Washington Territory," approved June 3, 1878. (20 Stat. 89) as amended by Act of August 4, 1892, (27 Stat. 348) extending the benefits of the former act to all the public land states, did on that day tender his written statement in form as required by law to the Register of th eUnited States local land office at Duluth, that being the District within which the land was situated, said statement being duly verified as the law required, with the tender of the fees for such complete filing and entry, and requested the local officers to receive and file such statement in their office, and allow him to take the necessary proceedings which would entitle him to purchase said land under the provisions of the Acts of Congress above referred to. The local officers received and filed said statement but subsequently rejected the right of said applicant to further proceed to acquire title under the provisions of said Act for the alleged reason that such application to purchase, conflicted with the Northern Pacific Railroad Company's selection made of the same land October 17, 1883, as shown of record in their office. From the rejection of this application to purchase the said Charles D. Campbell appealed to the Commissioner of the General Land Office. Subsequently and while such appeal was pending before said Commissioner and undecided,

this plaintiff, on November 9, 1896, renewed his application to purchase said land, which was again refused by the local officers for the reason of conflict with the selection of the same land by the Northern Pacific Railroad Company, but said written statement was received and filed in the local office and sent by them to the Commissioner of the General Land Office. On the 28th day of December, 1897, the said plaintiff did again renew his application to purchase said land by filing his written statement as required by law, and again the local officers refused to allow the plaintiff's application to purchase for the reason that it conflicted with the selection of the same land by the Northern Pacific Railroad Company as shown by its list filed in the Duluth land office October 17, 1883, but the local officers received said written statement and filed said application in their office, and subsequently forwarded the same to the Commissioner of the General Land Office. All of these facts appear in the record of this case on page 27, 28 and 29.

By the Act of Congress of July 2, 1864, (13 Stat. 365) under which the Northern Pacific Railroad Company was incorporated, there was granted in aid of the construction of its road (Sec. 3), " ten alternate sections of land per mile on each side of said railroad when ever it passes through a state" and it was authorized to seek indemnity in lieu of lands disposed of, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers not more than ten miles beyond the limits of the granted land. On May 31, 1870, Congress passed a joint Resolution (16 Stat. 378) a part of which is as follows:

> "In the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof,

> the amount of lands per mile granted by Congress to said Company; within the limits prescribed by its charter ,then said Company shall be entitled, *under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States,* and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency."

The land in controversy is within the second indemnity limits of the grant to the Northern Pacific Railroad Company, and it appears from what has been quoted that the selection of indemnity land was not only placed under the direction of the Secretary of the Interior, but that the railroad company were to receive from him the selection of only such land as he thought it was entitled to.

A controversy arose between the Secretary of the Interior and the Northern Pacific Railroad Company in 1894, as to the initial point or eastern terminus of the Northern Pacific Railroad. On November 13, 1885, (21 L. D. 412), the Secretary of the Interior, after consideration of the subject, determined that the initial point or Eastern terminus of said road was not further east than Superior, Wisconsin. On August 27, 1896, (23 L. D. 204) the decision of the Secretary of the Interior established the Eastern terminus of the Northern Pacific Railroad Company at Duluth, the decision was to the effect that all lands lying east of the terminus of said company's grant established at Duluth had been restored to the public domain, and were subject to entry. This would include the place as well as the indemnity lands. On July 17, 1897, (25, L. D. 48). The Commissioner of the General Land Office issued the following

directions to the Register and Receiver of the United States Land Office at Duluth, Minnesota.

"On August 27, 1896, (23 L. D. 204) the Secretary of the Interior rendered a decision wherein he held that the initial point on Lake Superior, or the Eastern terminus of the grant to the Northern Pacific Railroad Company, was at Duluth, Minnesota, and on December 24, 1896, he approved a diagram prepared by this office showing the Eastern terminal of the grant. On January 23, 1887, a copy of so much of said diagram as related to, or affected lands within your district, was transmitted to you for the use and guidance of your office. The decision of the Secretary aforesaid had the effect of restoring to the public domain all lands lying east of said terminal which has heretofore been withdrawn on account of the grant to said railroad company. Therefore, to the end that all persons interested may have opportunity to present *any claims* they may have to any of these lands, you will cause to be published for the period of thirty days in some newspaper of general circulation in their vicinity, a notice referring to said Secretary's decision which in effect declared that all lands previously withdrawn on account of the grant to the Northern Pacific Railroad Company lying east of the terminal established at Duluth, are restored to the public domain and are subject to disposal at your office. It should be specifically stated in said notice that all persons claiming rights, under the provisions of the Act of March 3, 1887, (27 Stat. 556) through purchase from the railroad company, should come forward and assert their claims at the earliest possible date in order to avoid conflict which will necessarily arise through entries made

under the general land laws, your office having no information as to the tracts likely to be claimed under said act.

The receiver, as disbursing officer, will pay the cost of the publication and forward a copy of the notice, with proof of publication as his voucher for the disbursements.

BINGER HERMANN,
Commissioner.

Approved
C. N. BLISS,
Secretary of the Interior.

It will be noted that in this letter from the Commissioner to the Register and Receiver at Duluth, it is stated, that said notice is to be published *to the end that all persons interested may have opportunity to present any claim they may have, to any of these lands.* If the Northern Pacific Railroad Company had made any selections of land within its indemnity limits from which it claimed an interest, such claim would come within the spirit of said notice. It is admitted by the defendants in their answer, (record P. 72) that said notice above referred to was given as set forth but no action was "required by the Northern Pacific Railroad Company to protect or enforce its rights to the land in question" for this reason the railroad company made no claim for any land under said notice.

The application of the Northern Pacific Railroad Company for the suspension of action looking to the disposal of lands listed and selected on account of the Northern Pacific grant east of the terminal established by the departmental decision of April 27, 1896, (23 L. D. 204) was denied by the Secretary December 13, 1897, (25 L. D. 501). The selection of land east of

Duluth for indemnity by the Northern Pacific Railroad Company were formerly cancelled from the records of the Duluth land office March 22, 1897. On Februray 28, 1898, (26 L. D. 65) the Secretary of the Interior directed a suspension of further entries of land lying east of Duluth (26 L. D. 265). On May 26, 1900, the order of cancellation heretofore made was recinded and the selection restored to the record.

It is claimed that under the decision of the Supreme Court in the case of Doherty v. Northern Pacific Railroad Company 177 U. S. 830, that the Secretary erred in the cancellation of the selection of this land claimed by the Northern Pacific Railroad Company lying east of Duluth. That the order directing the cancellation of the land granted to the Northern Pacific Railroad Company within its place limits was ineffective may be admitted, but that decision had nothing to do with the selection of land within the indemity limits, those lands were under the control of the Secretary of the Interior, and the railroad company had no interest in them until selections had been made and those selections approved by the Secretary.

The plaintiff having appealed to the Commissioner from the rejection of his application to purchase by the Register and Receiver for the reason that said application conflicted with a prior selection of the same land by the Northern Pacific Railroad Company, said Commissioner on October 3, 1901, made and rendered his decision—a copy of which is found in the record on page 6. The Commissioner states among other things, that the Northern Pacific Railroad Company on October 17, 1883, selected this land within the second indemnity limits in lieu of lands in Section 17 and 19—Township 133, North-Range 34—West, in the primary limits of the grant, but disposed of between the date thereof and

the definite location of the road, and that such selection has not since been abandoned nor the basis otherwise used.

That the selection, however, was cancelled by letter of March 23, 1897, because the land is east of Duluth, the then Eastern terminus of the grant under departmental ruling; subsequently the Supreme Court of the United States decided 177 U. S. 435 that the grant extended to Ashland, Wisconsin, and thereafter said cancellation was recinded and the selection restored by letter to the Register and Receiver of May 26, 1900. That on October 26, 1895, Charles D. Campbell (the plaintiff in this case) filed his application for Timber and Stone Entry of the SE¼ of the land in controversy, which was refused because of Company's selection. Campbell filed a request for a hearing, the purpose of which was to show the illegality of the company's selection of said land, on the ground that it was not the nearest available land to the designated loss, this was denied. Subsequently he submitted a petition for a hearing claiming that the basis so offered for selection is without right or foundation for patent, to which the Commissioner decides that the status of basis for the Company's selection is a matter entirely of record evidence, and not the subject of parol testimony. Such being the fact the Commissioner could see no reason for a hearing and the same was denied.

From this decision the plaintiff appealed to the Secretary of the Interior who on September 6, 1905, (Record P. 8) affirmed the decision of the Commissioner, basing his opinion on the departmental decisions in the cases of Eaton v. Northern Pacific Railway Company (33 L. D. 425) and that of August 30, 1905, (34

L. D. 105) of Jones v. Northern Pacific Railway Company. On November 7, 1905, (Record P. 93) the Secretary of the Interior approved the selection of the land in controversy by the Northern Pacific Railway Company, and on the 13th day of November, 1905, (Record P. 89) the land in controversy was patented to the Northern Pacific Railway Company.

Upon the facts above recited the appellant brought his action against the defendant the then owners of the legal title by virtue of the patent issued to the Northern Pacific Railway Company praying for a decree quitting his title to said land. This action was brought in the Distrct Court of the Eleventh Judicial District within the State of Minnesota, and the cause was removed on the petition of the defendants to the Circuit Court of the United States for the 5th Division of Minnesota, and such proceedings were had therein that a hearing was had on March 5, 1907, and a decree dismissing the bill with cost, was entered March 12, 1907. The Circuit Judge gave no reasons why said action was taken, which necessitated the appellant to appeal the case to the United States Circuit Court of Appeal for the Eight Circuit, which court after due consideration --the determination of which is embodied in its opinion affirmed the decree of the Circuit Court of the United States. The appellant has appealed this case and it is now before this court for its consideration.

ASSIGNMENT OF ERRORS.

FIRST: In adjudging that the Northern Pacific Railroad Company, under its charter, approved July 2, 1864, was entitled to indemnity for the loss of land which was the basis of the selection of the land in controversy in this case.

SECOND: In adjudging that the land described in this Bill of Complaint herein was not vacant public land subject to entry at the time Charles D. Campbell tendered his application to purchase the same.

THIRD: In adjudging that the land described in the Bill of Complaint herein which was situated on the north side of the line of the Northern Pacific Railroad Company could be legally selected as indemnity for the base land which was situated on the south side of said railroad line.

FOURTH: In not adjudging that the land described in the Bill of Complaint herein was not vacant public land subject to entry at the time Charles D. Campbell made his application to purchase the same, said land having been restored to the public domain by order of the Secretary of the Interior, July 27, 1897 (25 L. D., 48), prior to the date of the application of Campbell.

FIFTH: In adjudging that the claim of Charles D. Campbell to the land described in the Bill of Complaint did not come within the provisions of the Act of July 1, 1898, that it was not the intention of Congress in the enactment of said law to protect claims to land of such character.

SIXTH: The Court erred in the construction of the Act of July 1, 1898, in adjudging that its provisions only applied to settlers upon lands prior to January 1, 1898, and to those that purchased the same and completed their entry prior to January 1, 1898.

SEVENTH: In adjudging that Charles D. Campbell had no claim to the land described in the Bill of Complaint herein, that could be recognized, because the land was segregated from the public domain by the prior selection of the same by the Northern Pacific Railroad Company.

EIGHTH: In adjudging that under the act of Congress of June 3, 1878, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nevada and Washington Territory" as amended by Act of August 4, 1892, extending the former act as to all of the public land States, no right attached to the land by virtue of the application to purchase tendered by Charles D. Campbell, that his claim to the land did not come within the purview of the Act of July 1, 1898.

NINTH: In adjudging that there was a valid selection of this land by the Northern Pacific Railroad Company, and that such selection could be legally approved by the Secretary of the Interior.

TENTH: In adjudging that the Northern Pacific Railway Company was the successor in interest of the Northern Pacific Railroad Company.

ELEVENTH: In adjudging that that patent issued to the Northern Pacific Railway Company for the land was valid.

TWELFTH: In not adjudging that under the evidence in this case the patent issued to the Northern Pacific Railway Company for the land in controversy w as issued without authority of the law and was void.

THIRTEENTH: In adjudging that the act incorporating the Superior and St. Croix Railroad Company, and the amendments thereto (its name being changed to the Northern Pacific Railway Company) authorizing said corporation to purchase this land and receive the title to the same from the United States.

FOURTEENTH: In adjudging that the title to the land described in the Bill of Complaint herein, was acquired by the Northern Pacific Railway Company by virtue of a sale made by the special master, as set forth in the answer of the defendants and as shown by the evidence in this case.

FIFTEENTH: The Court erred in dismissing the Bill of Complaint and the decree is erroneous in so ordering and adjudging.

ACT OF JUNE 3, 1878.

The several decisions of the land department in this case demand an examination of the act of 1878, to ascertain what rights the complainant has under that law, and whether the department by a misapplication o f the law to an admitted state of facts, has deprived the complainant of that to which he has acquired a right under the sanction of that act.

The act of June 3, 1878, provides that land valuable chiefly for timber, but unfit for cultivation, and which has not been offered at public sale according to law, may be sold to citizens of the United States in quantities not exceeding 160 acres to any one person at the minimum price of two dollars and fifty cents per acre. Any person desiring to avail himself of the provisions of this act

is required to file with the register of the proper land district, a written statement in duplicate, designating by legal subdivisions the particular tract of land he desires to purchase, this statement must be verified by the oath of the applicant before the register or receinver of the land office within the district in which the land is situated.

By an examination of the record in this case we find that Campbell made at different times, (See record Exhibits A, B and C) three separate written statements, in the manner required by law, to purchase this land; to-wit: October 26, 1895, November 9, 1896, and December 28, 1897. Each of these several application were accompanied with the sworn statement required to be made, and verified in the manner specified in the act, and each of these several aplications were rejected, for the same cause, to-wit, a conflit with the prior selection of this land by the Northern Pacific Railroad Company. An appeal from such rejection was taken in each case—first to the commissioner of the general land office and second to the Secretary of the Interior, where the claim of Campbell was finally rejected, and subsequently a patent was issued to the Northern Pacific Railway Company.

When the timber applicant files with the Register a written statement, verified as the law requires, he initiated a valid claim to the land; and has a preference right to purchase against everybody, but a prior claimant, and the United States. The prior claimant in this case, if any existed was the Northern Pacific Railroad Company. Whatever clai mit had to the land arose from its preliminary selection of this land on October 17, 1883. The United States never has asserted any claim other than the general one that the land belonged to the public domain. The existence of an adverse claim does not

effect the validity of the timber and stone filing, but such claim must be disposed of in some way before the claim of the applicant under the act of 1878 could be allowed, and when it appears in such case that there may be an adverse claim, a hearing should be ordered, and if it should be found that such adverse claim was valid, the rights of the timber aplicant would be disposed of. The authority of the department to cancel entries of this character upon sufficient proof that the land at the time of the filing of the written statemen was not subject to entry, is not disputed, but it is insisted that the department can only act in such cases within the law, the Secretary is not authorized to destroy a title to land in an arbitrary manner, for if he does he misapplies the law, and the courts will grant relief.

The decision of the Secretary gives no reason for the rejection of the application of Campbell to purchase this land. It refers us to the cases of Eaton v. Northern Pacific Railway Co. (33 L. D. 426) and Jones v. the same (34 L. D. 105) and says that "for the reasons given in said decisions these applications to purchase will stand rejected." In the examination of the case of Eaton v. Northern Pacific Railway Co. (supra) nothing is found bearing on the act of June 3, 1878.

In Jones v. Northern Pacific Railway Co. the Secretary said:

> "No vested right is acquired by a timber and stone application, while such an application, if presented in acordance with law, and for land subject thereto, reserves the land from other disposition by the land department, no right is initiated as against

the government, and prior to the submission and acceptance of final proof and the payment of the purchase price, the Secretary of the Interior may suspend the same from disposition and sale under the public laws."

It is not claimed that Campbell by his application became vested with the title to this land, all that is claimed for him is that by the filing of his statement he initiated a valid claim, which would ripen into a perfect title provided that it was not shown that a prior claim to the land existed, or that prior to the payment for the same the United States should make some other disposition of the land. It is not claimed that for cause appearing the Secretary could not suspend action, but that action does not go to the extent of the final rejection of the claim without the proof of a prior valid adverse claim to the land appeared after the applicant has had the right to contest the same, or some disposition of the land by the United States which would render the claim of Campbell of no value.

In this case the proof shows that when Campbell filed his written statement to purchase this land December 28, 1897, whatever effect the preliminary selection of this land by the Northern Pacific Railroad Company may have had, that selection had been cancelled, and prior to December 28, 1897, the land had been restored to the public domain and subject to disposal in the same manner as other public land, under the decision of the Secrtary of the Interior of August 27, 1896.

On January 23, 1897, a copy of a diagram relating to this land was transmitted to the local office at Duluth for the use and guidance of such office. (See record, page

Campbell proceeded in strict conformity, and therefore initiated a valid claim to the land under the act of

June 3, 1878. If he was prevented from acquiring title to the land by reason of the prior claim to the same made by the Northern Pacific Railroad Company, then it is claimed that he comes within the provisions of the Act of July 1, 1898, and under said act he should be allowed to proceed with his proofs and acquire the title.

I have before said that Campbell does not claim that by his aplication he obtained a vested right in this land. He insists, however, that being in all respects duly qualified to enter public land, by such application he obtained a preference right to purchase in case the land was offered for sale, in preference to all others, and that such right was a legal right which he possessed, which he could only be divested of by a valid prior adverse claim, or by an act of Congress otherwise disposing of the land. His right thus acquired could not be prejudiced by the refusal of the local officers to receive his proof, upon their declaration that the land was reserved, if in point of fact there was no reservation. Shepley v. Cowan, 91 U. S. 424 (1 ed).

An application for land under the act of June 3, 1878, is not that shadowy right which by some it is considered to be; until sanctioned by law, it has no existence as a substantial, but when covered by law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it. It is a well established principle, that where an individual in the prosecution of a right has done everything which the law requires of him to do, and he fails to attain his rights by the misconduct or neglect of a public officer, the law will protect him. In this case Campbell tendered his application for this land, which was accepted, his application was subsequently rejected, and the reasons assigned for said rejection was the conflict with the selection of said land by the Northern Pacific Railroad Company, if that

selection was void, or had been removed there was no legal ground for rejection of his claim. Campbell could do nothing more than offer his application, in due form to purchase the land. The proofs show that the aplication of Campbell was made in good faith, and in fact this is admitted, and that he would have paid for the land if he had been permitted to do so. Campbell's claim to said land, therefore stands in a light no less favorable than it would have stood, had he been permitted by the land officials to do what, in this respect he offered to do.

Lyttle v. Arkansas, 9 How. 153.

The officers of the government are simply the agents of the law. They are not permitted to act beyond its provisions, or make any compromises not sanctioned by it. Cunningham v. Ashley, 14 How 379; Lindsay v. Howes, 67 U. S. 267 (1. ed).

In Frisbie v. Whitney, 76 U. S. 668, (1 ed.), the controversy arose over the title to a tract of land which Frisbie claimed the legal and Whitney claimed the equitable title arising from his possession of the land, and his application to pre-empt the same. The court held that Whitney by his application did not acquire a *vested* right in the land, and after reviewing the cases on this subject, the court speaking through Mr. Justice Miller, said:

> If in any of these cases the party, asserting successfully his equitable interest, had not acquired a vested right in the just sense of that term, the cases ar still widely different from the one under consideration. In all those cases the successful party had established his legal right of PREFERENCE OF PURCHASE OVER THE OTHER, under the law as it stood when the land officers decided the case.

AND IT WAS THE ACTION OF THOSE OFFICERS, AND THEIR DISREGARD OF THE LAW IN REFUSING TO THE PARTY THE BENEFIT OF THIS PREFERENC IN PURCHASE, WHICH THIS COURT CORRECTED BY COMPELLING THE CONVEYANCE OF THE LEGAL TITLE ACQUIRED BY THIS VIOLATION OF THE LAW.

But in the case before us and in those to which the opinion of the Attorney General refer, it was Congress, the lawmaking power, which intervened and, by a new law, withdrew the land from the operation of the pre-emption laws, while the right of preference in purchase remained unexercised, and amounted to no more than a preference. The court may very properly correct the injustice done by the land officers, in refusing to accord rights, HOWEVER "INCHOATE" which are protected by laws still in existence; while they can only consider *vested* rights when those rights are sought to be enforced in opposition to the repeal or modification of the laws on which they are founded.

In this case the law remained the same as it did when Campbell made his application, and the sole cause of rejection was the supposed conflict with a prior selection of the same tract by the Northern Pacific Railroad Company. The decision in the case of Frisbie v. Whitney determines that the right of Campbell, however inchoate it might be, should be protected. If the claim of Campbell to this land conflicted with that of the Northern Pacific Railroad Co., then it was such a claim as would come within the act of July 1, 1898, and it should be adjusted under the provisions of that act. If it should be considered by the court as not of the character of claims provided for under that act, then we claim that independent of that

act Campbell had a preference right of purchase, which was disregarded by the land department, and for that reason the court should protect Campbell from the wrongful acts of the officers of the department and grant relief.

Hutchings v. Low, 82, U. S. 82, (1 ed).

THE ACT OF JULY 1, 1898.

Campbell claims that he is protected in his title under the provisions of the Act of July 1, 1898, which provides:

> "That where, prior to January 1, 1898, the whole or any part of an odd-numbered section in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor, is claimed to have attached by definite location or selection, has been purchased directly from the United States, or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee, or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select, in lieu of the land relinquished, an equal quantity of public lands, surveyed or unsurvey * * * situated within any State or Territory into which said railroad grant extends, and patents shall issue for the lands so selected as though they had been originally granted."

What was the intention of Congress in the passage of this act; for when the intent is ascertained, it is to control its interpretation. The act is to receive such a construction, as will carry out the intent of Congress, however difficult it might be to give full effect to the language used. The object of all interpretation is to ascertain the intent of the lawmakers; to get at the meaning which they wish their language to convey. Courts are to accord a meaning, if possible, to every word in a statute. The admitte drules of statutory construction declares that a Legislature is presumed to have used no superfluous words. In putting a construction upon any statute every part must be regarded, and must be so expounded, if practicable, as to give some effect to every part of it, and where a given construction would make a word redundant, it was reason for rejecting such construction. No words are to be treated as surplusage or as repetition. The phrases in this act of the words, "purchased directly from the United States," or "settled upon," or "claimed in good faith," or by "color of title," or by "claim of right" must therefore each have some distinctive meaning. We are seeking for the intention of Congress, and to discover that we may also look at the paramount object which Congress had in view, in the passage of this act, as well as the means by which it proposed to accomplish that object.

In the case of Humbird v. Avery, Judge Lochren, in speaking of the act of July 1, 1898, (110 Fed Rep. 465), said:

> "The obvious purpose of this act was to provide a certain, speedy, and equitable way in which all controversies between the railroad grantee, or its successors, and purchasers or settlers upon odd-numbered sections within the place or indemnity

limits of the land grant who claimed by color of any law of the United States, or any ruling of the Land Department, should be settled and adjusted, without contest or litigation, either in the Land Department, or in the courts, the railway company by its express acceptance of the act became bound by its provisions, and obligated to carry out its terms. * * *

"The situation at the time of the passage of the act of July 1, 1898, was this: By reason of the erroneous ruling of the Secretary of the Interior as to the location of the Eastern terminus of said railroad, and his revocation of his prior approval of lawful selections by the railroad company of indemnity lands, and permitting sales and entries of such selected lands, as unappropriated, he had introduced confusion and conflict in respect to the right to such lands, which was beginning to be litigated in the courts; as the suits which resulted in the supreme court decisions above cited had then been commenced, and very much litigation seemed probable. The fact that patents had issued in a few instances would not end such disputes as to the lands so patented, as courts would adjudge the patentee in any case to hold the title in trust for the other party, wherever the other party had clearly the right to the land. The quieting of claims and titles to such a vast area of land, was matter of public concern, and it was proper and beneficent legislation on the part of congress to thus provide for the settlement and ending, with the full consent and through the voluntary action of the parties in each instance. * * * Complainants contention that the act of July 1, 1898, only applies to lands claimed by

"settlers" cannot be maintained. The language employed is broad enough to include all purchases from the United States, under any law, or ruling of the Land Department."

In the case of Humbird v. Avery, 195 U. S. 286-295 (L. ed.), Mr. Justice Harlan, in delivering the opinion of the court, said:

"Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers, both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the Land Department to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was therefore, as the circuit court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands, would become vexatious. Extending over many years and causing great embarrassment. In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned, the government, the railroad grantee, and individual claimants. The railroad company evinced its approval of this action of the legislative department by a prompt acceptance of the act in its

entirety. By such unqualified acceptance the railroad company agreed that, so far as it had any claim to the lands in dispute, whatever the act of congress required to be done might be done.' Viewed in the light of these decisions can there be any question but that the intention of congress in the enactment of this law was to protect all claimants to land within the disputed territory, who prior to January 1, 1898, claimed such land under any law of the UUnited States, or any ruling of the Secretary of the Interior."

The right to the benefit of the act was fixed at the date when in good faith Campbell made his claim to the land. The decision of the Land Department that none are entitled to the benefits of this act except a purchaser whose entry is completed by payment prior to January 1, 1898, or a "settler" on the land prior to that date, is a construction altogether too narrow. It not only violates the fundamental rules of statutory construction, but leaves open to litigation a vast number of disputed claims that it was the intention of Congress by this act otherwise to pispose of. The regulations issued to facilitate the adjustment by the land department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company under the act of July 1, 1898, (28 L. D. 103); and the construction placed upon the act by the land department, as to who were the beneficiaries under the act is stated in paragraph 1, on page 105, in which the Secretary of the Interior said:

"The act designates a class of beneficiaries whose status is that of claimants adverse to the Northern Pacific Railroad Company or its successor in interest, and in doing so, different words and terms of description are used in different portions

of the act, but considering the act in its entirety, and giving due recognition to each provision therein, this class embraces any qualified person who, prior to January 1, 1898, by settlement, entry, or purchase initiated in good faith a claim to lands of the description given "under color of title or claim of right under any law of the United States or any ruling of the Interior Department" and who is still maintaining such claim conformably to such law or ruling."

Subdivision C, paragraph 8, under the head of "What are the claims which come within the provisions of this act?" is answered:

> "An individual claim adverse to the railroad claim is one which prior to January 1, 1898, was INITIATED IN GOOD FAITH by some qualified person, by settlement, entry, or purchase "under color of title or claim of right under any law of the United States or any ruling of the Interior Department, * * * and which is still maintained conformably to such law or ruling, and is one which, in the absence of the railroad claim, could be perfected into full title."

Campbell's application being rejected and the land subsequently patented to the Northern Pacific Railway Company, closed the door to any further proceedings under the act of June 3, 1878.

The application of Campbell made December 28, 1897, was the initiation of a claim to the land, and was one which in the absence of the railroad claim, could be perfected into full title. The land was open for sale when Campbell tendered his written statement. He had done all that he could do to perfect his right to the title of the United States. He had a legal right in

this case to be preferred when a sale was made. His claim was good against everybody but the one holding a prior claim, which in this case could only be the Northern Pacific Railway Company—and the act of July 1, 1898, extinguished that claim. It is not within the power of the Land Department to arbitrarily destroy a title initiated under any of the land laws of the United States, but that is what has been done in this case.

UNDER THE ACT OF JULY 2, 1864, THE NORTHERN PACIFIC RAILROAD COMPANY WAS LIMITED TO TEN ALTERNATE SECTIONS OF LAND PER MILE ON EACH SIDE OF ITS RAILROAD, WHENEVER IT PASSES THROUGH A STATE.

Sec. 3 of the act of July 2, 1864, enacts that there be, and hereby is granted to the Northern Pacific Railroad Company:

> "Ten alternate sections of land per mile on each side of said railroad whenever it passes through a state."

It also provided an indemnity limit of not more than ten miles beyond the limits of said alternate sections, for the selection of an equal quantity of land that had been disposed of by the government within the place limits of its grant, when the line of its road had been definitely fixed. Beyond these lateral limits the company could not seek indemnity. The intention of Congress in making this grant was not only to have this road constructed but that the burden of its construction should fall equally on each side of this road, for each side would be equally benefited. If on fixing the line of the definite location, it was found that lands had been "granted, sold, reserved, occupied by homestead settlers, or pre-empted,

or otherwise disposed of," other lands should be selected by said company in alternate sections and designated by odd numbers not more than ten miles beyond the limits of the alternate sections. The act provided that this ten mile limit should be on each side of the railroad line. The grant of July 2, 1864, to the Northern Pacific Railroad Company, was ten alternate sections of land per mile on each side of the railroad line whenever it passes through a state. The language is plain, no construction of its meaning or the intention of Congress in using those words is necessary. It was not a grant of twenty sections of land per mile, or a permission to take 15 sections per mile on one side and five on the other, as might suit the convenience of the company. The grant to the Northern Pacific Railroad Company was not one of quantity, but for a certain number of sections in place, and if not found, then the company were allowed to look for the deficiency in other restricted limits, but such selection must be made of the lands on the same side of the road, that the lands lost to its grant were situated.

If the company does not get its full amount of lands within its primary limits, and fails to make up its loss within its secondary limits on the same side of the line of its road in which the loss occurred, then it is a barren right. It is the happening of a contingency plainly contemplated in the granting act, subject to which the company made its contract.

If there were only nine sections of land per mile subject to appropriation by the company within its place limits on the south side of its road, at the time of the definite location of its road, the company would have a right to select on the south side of its road one section of land within its first indemnity limits, not more

than ten miles beyond the granted limits, if the land could not be found within the first indemnity limits, and the loss to the grant was subsequent to its grant and prior to its definite location, then under the joint resolution of May 31, 1870, the company could go into the second indemnity limits to make up the deficiency, but it must be on the same side of the road the loss occurred.

I am aware that this rule has not been observed, by the Department in allowing the selections for deficiency by this railroad company. It has been and at the present time is the practice of the land department to allow the Northern Pacific Railroad Co. to roam anywhere within the lateral limits of its grant, and select land as indemnity,—without regard to its location on the one side or the other of its line of road. That the department is in error in the allowance of such selections. I refer to the decision of the United States circuit court, in the case of the United States v. Burlington & Missouri River R. R. Co., 4 Dillon 287, and afterwards affirmed in the Supreme Court of the United States, 98 U. S. (I. ed), 198.

The syllabus in the case in the Circuit Court of the United States—the opinion in that case being delivered by Mr. Justice Miller, one of the justices of the Supreme Court of the United States—is as follows:

> "There was no authority in the grant to issue patents for land on the north side of the defendant's road, in lieu of lands deficient on the south side of its road, and such patents are void. But in the bill to have such patents declared null the lands must be described or identified."

By Section 18 of the act of Congress of July 2, 1864, (13 Stat. at Large 356), amending the act of 1862 (12 Stat. at Large 489), "To aid in the construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean and to secure to the government the use of the same for Postal, Military, and other purposes." The Burlington and Missouri River Railroad Company, an existing corporation under the laws of Iowa, was authorized to extend its road through the Territory of Nebraska, etc.

Section 19 of the act is as follows:

> "That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington and Missouri River R. R. Co. every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per miles on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

With the exception that this railroad had no lateral indemnity limits, the grant was similar to that in aid of the construction of the Northern Pacific Railroad Company. The United States brought its action to vacate and declare void the patents issued for certain lands on the north side of said road selected for indemnity for an equal amount of land lost to its grant on the south side of its road. On this question Mr. Justice Miller, speaking for the court, said:

"It is alleged that 150,000 acres of land lying on the north side of defendant's road, has been patented in lieu of lands found deficient on the south side of said road, and that the patents so issued are void. I am of opinion that the act of Congress did not intend to grant twenty sections per miles on each side of the road, that no right to take more on either side of the road than what amounted to ten sections per mile on that side was conferred. If, for any reason, the required number of sections could not be found on one side, it was as in the case of similar deficiency in the twenty mile limits of the other road, a loss which congress had made no provision to supply. THERE EXISTED THEREFORE NO POWER IN THE OFFICE OF THE LAND DEPARTMENT TO ISSUE PATENTS FOR LANDS ON THE NORTH SIDE FOR THOSE NOT FOUND ON THE SOUTH SIDE. If the lands so patented can be identified I think that as to these the patent conveys no title."

The case was appealed to the Supreme Court of the United States, and is found reported in the 98 U. S. (L. ed.) 198. Mr. Justice Field delivered the poinion of the court, on this subject he said:

"It only remains to notice the further objections to the patents, that lands to the amount of 150,000 acres on the north side of the road is included in them in lieu of land deficient on the south side. It is true, the act of Congress contemplates that one-half of the land granted should be taken on each side of the road; and that the department could not enlarge the quantity on one side to make up a deficiency on the other, but the answer to the

objection as presented by the bill, either in its original form or as amended, is that it is not shown what this land was, and the patents can not be adjudged invalid as to any land not identified; so as to be capable of being separated; nor can any decision go against the company for its value without such identification. It is possible that the land to which the company was entitled is not so described in the patents that it can be separated from that which should not have been patented. If such be the fact, the government may be without remedy."

In the case under consideration, the land patented can be identified; it is the SE¼, Sec. 21, T. 54 N., R. 12 W., it was selected by the Northern Pacific Railroad Company as indemnity for the loss of the SE¼, Sec. 19, T. 133 N., R. 34 W. The defendants in their answer:

> "Admit that the basis of the railroad selection was the loss of the SE¼ of Sec. 19, T. 133 N., R. 34 W., which is about 147 miles (not 200 miles as alleged in the bill) west and 50 miles south of the land in controversy; the lost lands being on the south side of the railroad line while the selected land is on the north side."

With this admission on the part of the defendants, we might with confidence rest our case the law governing it has been determined by the courts. It declares that the land department was without authority to patent this land to the Northern Pacific Railway Co., the patent therefore is void, and conveys no title. If the patent is void, the selection of this land by the railroad company must also be void. If so, then there was no valid adverse claim to this land when Campbell filed his written statement and offer to purchase, it follows that

he is entitled to proceed and complete his entry by payment and receive the usual evidence of title to this land.

The case of the Southern Pacific R. R. Co. v. Smith and others, decided May 18, 1896, and reported in 74 Fed. Rept. p. 588, is on all fours with this case which we are now considering. The lands in controversy in that suit was patented to defendant Smith, and the Southern Pacific R. R. Co., claimed to be entitled to them by virtue of a congressional grant, and brought its suit to obtain a decree that the title conveyed by the patent is held in trust for it, and to compel the conveyence thereof to the complianant, and to enjoin the defendants from asserting any title to the lands.

The terms of the grant under which the complainant claims, are to be found in an act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast (14 Stat. at L. p. 292). The third section of this act is an exact copy of the 3d section of the act of July 2, 1864, by which the Northern Pacific Railroad Company was incorporated. So far as applicable to the present case, it was a grant of every alternate section of public land, not mineral, designated by odd numbers, to the amount of 10 alternate sections per mile on each side of the road to which the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time such route should be designated by a plat thereof, filed in the office of the commissioner of the general land office; and where, prior to that time, any of the sections or parts of sections should be granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, the act provided that other lands should "be selected by

said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." It appears that the line of definite location of said road was fixed April 3, 1871, and on April 21, 1871, the commissioner of the general land office, by direction of the Secretary of the Interior withdrew the odd numbered sections of land within 30 miles of the railroad line from sale, location, pre-emption, or homestead entry, which order of withdrawal has ever since continued in force and effect, the railroad was thereafter constructed and fully equipped, and was accepted and approved.

On October 3, 1887, the complainant filed its indemnity list No. 25 in the proper land office within which district the lands in controversy were situated, describing the tracts in controversy as selected by the complainant in lieu of the lands lost to complainant; the indemnity list was in due form. The filing of the list of selection by the railroad company was prior to a settlement or entry of the lands by defendant Smith, his application for said land having been made December 7, 1887, more than two months after the filing of the list of selection by the railroad company. When the railroad company filed its list of selections, the land in controversy was vacant and unappropriated, to which the United States had full title. The lands lost to the railroad company were situated on the north side of its road as definitely located and constructed, while the lieu lands were situated on the south side of said railroad line, defendant Smith made a pre-emption filing which is similar to a timber and stone application.

From these facts the court said:

"The lands in controversy are within 30 miles of, but more than 20 miles from, the road as definitely located an deonstructed, and, if vacant and unappropriated, were subject to be taken as authorized by the law, to make good losses sustained by the complainant within the primary limits of its grant. Complainant attempted to select these lands, which are situated on the south side of its road, on October 3, 1887, in lieu of lands situated on the north side thereof, within the primary limits of its grant, and which were lost to complainant, by including them in a list filed on that day in the proper local land office, in the form and accompanied by the certificates, affidavits, and fees required by law. This was prior to any attempt at settlement on, or entry of, the lands by the defendant Smith; his settlement, which was the basis of the patent subsequently issued to him, having been made December 7, 1887. * * *

The land in controversy being within the indemnity limits of the complainant's grant, and being at the time of the complainants attempted selection of them, vacant and unappropriated, to which the United States had full title,—and not falling within any of the exceptions of the grant, and the complainant having done all in its power to select them by filing in the proper office its claim to them in due form, accompanied by the affidavits and certificates required by law, and paying the proper fees, I think it clear that it is entitled to maintain the present bill unless it be, as contended on the part of the defendants, that indemnity lands on one side of the road can not be selected to make good losses sustained by the complainant on the other side. That they can not is, I think, in effect, held

by the Supreme Court in the case of U. S. v. Burlington & Missouri River R. R. Co., 98 U. S. 334-342. On the authority of that case, a decree will be entered sustaining the plea, and dismissing the bill."

The land involved in this controversy is the SE¼, Section 21, T. 54 N., R. 12 W. It was selected by the Northern Pacific Railroad Company as indemnity for lands in the SE¼ of Section 14, T. 133 N., R. 34 W. The lost land is south of the line of road, while the selected land is north of said line of railroad. If the decision in the case of Southern Pacific R. R. Co. v. Smith (supra) is good law, and it must be considered as such, as the Southern Pacific R .R. Co appears to have acquiesced in the same, then under the rulings of that case and that of the Burlington case the complainant in this case should on this question alone be entitled to a decree of this court in his favor.

The act of Congress of July 2, 1864, creating the Northern Pacific Railroad Company and granting it aid for the purpose of the construction of a railroad from Lake Superior to Puget Sound under the provisions of Section 4 of said Act (13 Stat. at L. 368), enacted, "That whenever said 'Northern Pacific Railroad Company' shall have 25 consecutive miles of any portion of said railroad and telegraph line ready for service completed, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that 25 consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the

president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situate opposite to the coterminous with, said completed section of said road; and, from time to time, whenever 25 additional consecutive miles shall have been constructed, completed and ready as aforesaid and verified by said commissioners to the president of the United States; then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every 25 miles of said road is completed as aforesaid."

By this section, the Northern Pacific Railroad Company was divided into sections of 25 miles for adjustment, and the railroad company would have no claim or right to any land not embraced within the 25 miles of road that had not been certified and completed as specified in this provision of the act, and no legal selection of indemnity for lands lost within the place limits of its grant could be selected unless the lost land was within some completed section of the 25 miles, and the land selected in lieu thereof was also within the same completed portion of the road. Can there be any question about the correctness of this proposition?

The Northern Pacific Railroad Company began the construction of its road in 1871, at a point in Section 1, Tp. 48 N., R. 17 W., upon the definite line of its route and continued westerly on that line. The map of the general route of said road was filed with the Commissioner of the General Land Office August 13, 1870.

On the 6th of July, 1882, the Northern Pacific Railroad Company filed its map of definite location of its

road from Sec. 1, Tp. 48 N., R. 17 W., easterly to Ashlan, Wisconsin. The definite line of location diverges materially from the line of general route. This line of definite location is indicated by the black line on the map in the record of this case (Record page 122). Sec. 1, Tp. 48 N., R. 17 W., is at a point called Thomson Junction. From that point to Bluff Creek in Superior, Wisconsin, at a point in Sec. 32, Tp. 49 N., R. 13 W., is 25 miles from Thomson Junction, on Sept. 19, 1882, a map of this 25 miles of constructed road from Thomson Junction to Superior was filed in the land department, and a diagram showing the 20, 30 and 40 mile limits of the grant opposite said constructed road adjusted to the line of definite location was prepared by the Commissioner and filed in his office. The eastern terminus of the 25 miles from Thomson Junction is indicated by the line shaded yellow on the map (Record page 122). It was this 25 miles within which the Northern Pacific Railroad Company selected its lands on its list of selections October 17, 1883, at that date the eastern terminus of the Northern Pacific Railroad Company was not further east than Sec. 32, Tp. 49 N., R. 13 W., which was at Superior. In 1887 the railroad was completed to Ashland, Wisconsin, and was certified as completed and accepted by the president of the United States in that year. All east of the line shaded yellow on the map (Record p. 122) which indicates the lateral limits eastwardly of the 25 miles from Thomson Junction and embraces all the lands in controversy in the litigation, has no foundation to base selections for indemnity for lands lost prior to October 17, 1883. I contend that as the eastern terminus of the road was on October 17, 1883, at Superior, there was therefore no authority to make a diagram embracing land east of that point, and all the lands embraced in this fan shape diagram which was at that

time coterminous with the uncompleted portion of the road were not subject to selection, and therefore the lands selected at that date were not subject to selection, and thus the selections made at that date were void. If I am not correct in this legal proposition, I would like to have some one point out the error. If I am correct then all the lands falling within this fan shape diagram were not on October 17, 1883, subject to selection by the railroad company, and therefore it has no claim to the same.

It would therefore be incumbent upon one defending title to land claimed under such selection, to offer evidence showing the completion of the road, the appointment of commissioners, their reports and the acceptance of such report by the president of the United States. The filing of a selection list by the Northern Pacific Railroad Company wherein this land was shown to be selected in lieu of lands lost within the place limits of its grant, would be no evidence standing alone of the right of said company to select said land.

THE SELECTION OF THIS LAND FOR INDEMNITY, WAS VOID UNDER THE RULINGS OF THE DEPARTMENT AND THE DECISIONS OF THE SUPREME COURT.

To make a valid selection of lands in lieu of lands lost within the primary limits of the Northern Pacific Railroad Company's grant, the selection must be made in accordance with the decisions of the Supreme Court, and the rulings of the department. If not so made, then the listing of the land is of no more effect than if it had never been made.

Under the joint resolution of May 31, 1870, the company could receive no lands within the second indemnity limits of its road until it was made to appear that the quantity of lands in the first indemnity limits were insufficient to make up the deficiency. In the case of the Northern Pacific Railroad Co. vs. Bass, 13 L. D. 201, (decided August 24, 1891), it was held that the company must exhaust the lands within the first indemnity limits before it can get title to lands in the second, and refers to a rule made by the land department, the purport of which is as follows:

> "The Northern Pacific Railroad Company has no authority to select lands in the 40-mile limits until it shall be positively ascertained that the quantity to make up the full complement of its grant.

It must further appear that the land claimed to have been lost in the place limits of the grant, was sold, or disposed of subsequent to the date of the grant and prior to the date of the definite location of the road. These facts must appear in some form at the date of the filing of the list of selections, they are not of a character that can be assumed to exist; neither is it within the power of the commissioner, after the filing of the list, and upon further examination to discover their existence. It may be, that between the railroad company and the government, if upon further examination these facts were found to exist, the government might waive compliance, but when the rights of an individual has intervened, no essential facts that does not appear on the selection list at the time of the filing of the same in the local office can be added, implied, or assumed, by the

commissioner, or by any other person in order to sustain the selection. The selection must stand or fall as it appeared when filed in the local office.

The affidavits attached to selection list No. 15 and No. 15 B, supposed to show the facts required, are found on pages 14, 15 and 16 of the complaint. It will be noticed that in no place in these affidavits, is it stated, "that said losses have not heretofore been indemnified in any manner," as required by the circular of Aug. 4, 1885, (4 L. D. 90, neither does it appear, "that losses assigned for the bases in this list occurred from disposals subsequent to the passage of the act of July 2, 1864, and prior to the definite location of the road, as required by the joint resolution of May 31, 1870."

The land commissioner of the Northern Pacific Railroad Company, however, does state, in list No. 15 B, that he has "herein designated the lands heretofore selected as indemnity in said Duluth list No. 15, and no other lands." In selection list No. 15, the number of acres of lost land appearing in that list was 43,548.12 acres. In list No. 15 B, there only appears 32,678.19 acres, being 10,870 acres lost land than in selection list No. 15.

There does not appear in the affidavits attached to these selection lists facts sufficient to justify a selection of lands within the second indemnity limits of this railroad company.

Northern Pacific R. R. Co., 18 L. D. 596.

In the case of Jones v. Northern Pacific Ry. Co., 34 L. D. 105, made a part of the Secretary's decision in this case; it is said that any requirement for the specification of a loss as a basis for indemnity selection is only for departmental information, and as an aid in the adjustment of the grant. That the act of 1864, and the

resolution of 1870, each establish a limit beyond which the company cannot go in making its general selections; that in neither is there any requirement limiting such selections to the lands nearest the sections in which the losses to the grant occurred, and to so limit such selections would attach a condition or limitation upon the right of selection not found in the granting act. The Secretary's duty in the premises, it is said, is to supervise the administration of the grant, this supervision however does not permit him to abridge or enlarge the laws of congress, it is only necessary for him to see that the selections made in satisfaction of the grant are confined to the lands described in the granting act, but as between different sections equally within the descriptions contained therein, the Secretary can not say which may or which may not be selected, for in doing so he would be denying the railroad company the right to make the selection. In other words the railroad company in making its selections for indemnity, can select any land within the lateral limits of its grant, and the Secretary has no right to abridge this right. The land may be either within the first or second indemnity limits of the grant, but it need not be the nearest to the line of the road or nearest to the section where the loss occurred, and he closes this subject by adding that:

> "It might also be stated that it is learned upon inquiry at your office (that is the Commissioner's) that at least as to lands within the second indemnity belt, a strict adherence thereto, (that is in selecting lands nearest to the line of the road or to the land lost) has not been enforced."

It would appear from this that the Secretary of the Interior and the Commissioner of the General Land

Office agree upon this subject; that they are a law unto themselves; that any act done by them without authority, makes all its parts valid, and the more frequently they do what is forbidden by law, the stronger the claim for the enforcement. It is safe to affirm that neither the Secretary nor the Commissioner will obtain immortality based upon this decision. The Secretary of the interior is but a servant of the people, subject to the law the same as others. He is to administer the laws of Congress, not his own. This decision overturns a long line of cases going back for thirty years, and the reason for so doing must be stronger than appears in this case. In the Northern Pacific R. R. Co., 17 L. D. 404, (decided Oct. 14, 1893, on this subject the Secretary uses the following language:

> "It is a well settled principle, carried through all the legislation pertaining to lands grants to aid in the construction of railroads, that indemnity lands must be taken nearest to lost lands, so that the portion of the country benefited by the building of the road may bear the burden of the grant made to aid in its construction. The co-terminus principle, applied to nearly all the grants, was evidently intended to accomplish this result, were it otherwise, the company might also pass over the bad lands within the limits of its grant and pick out the best lands, which it has evidently done in the present case."

On review of this case, 20 L. D. 187, (decided March 12, 1895), the Secretary said:

> "It has for years been the doctrine of this department; that in all kinds of railroad grants providing for indemnity, the selection must be of lands subject thereto, nearest to lands lost. * * * The

burden was upon the Northern Pacific R. R. Co. to show that in the selection of lieu lands it has in fact selected the nearest vacant unappropriated lands to the lands lost.

Such examination should include the lands along the line of the road lying between the lands lost and the land to be selected. If the land could be selected anywhere within the lateral limits of the company's grant no such examination would be required. In Atlantic & Pacific R. R. Co., 8 L. D. 375, (decided March 29, 1889), referring to the circular of August 4, 1885, Secretary Noble held that "indemnity selections should be made from lands nearest the granted sections in which the loss is alleged," citing Wood v. Burlington & Missouri River R. R. Co., 104 U. S. (I. ed.) 772, in which the court used this language:

> "Although there was no express limitation of the distance from the road in which the land was to be selected, it was necessarily implied that the selections should be made of alternate sections nearest the road of which the land had not been previously sold, reserved, or otherwise disposed of. The company was not at liberty to pass beyond land open to its appropriation and take lands further removed from its road. In all grants which are to be satisfied out of sections along the line of a road it is necessarily implied, in absence of specific designation otherwise that the land is to be taken from the nearest undisposed sections of the character mentioned. Such grants give no license to the grantee to roam over the whole public domain lying on either side of the road in search of land desired. The grant must be satisfied out of the first land found which meets the conditions named."

In Wisconsin Central R. R. Co. v. Forsyeth, 159 U. S. (1. ed.) 71-75, (decided June 3, 1895), Justice Brewer in delivering the opinion of the court said:

> "The expectation is that the company receiving the odd sections will take pains to dispose of them to settlers, and thus by their settlement and improvement increase the value of the even sections adjoining and so justify the added price. To fully realize this expected benefit it is essential that the land taken by the company shall be as near to the line of the road as possible; and so, WHILE SELECTION OF REMOTE LANDS IS PERMITTED, IT IS ONLY WHEN AND BECAUSE THERE IS A NECESSITY FOR SUCH SELECTION TO MAKE GOOD THE AMOUNT OF THE GRANT. Obviously, therefore, an act must be construed to realize as far as possible, this interest and to accomplish the desired result.

The validity of the selection of this land, has been determined in the land department adversely to the claim of the complainant * * but it was so determined not upon a question of fact, but upon the construction of law, and that construction contrary to the decisions of the Supreme Court; it has been repeatedly held that a decision of the land department on questions of law, is not conclusive on the courts. The selection of this land being void, no authority existed in the land department to issue a patent to the railroad company for the same, such want of authority makes void the patent, and conveyed no title.

THE ORDER OF JULY 9, 1896, HOLDING FOR CANCELLATION THE PRELIMINARY SELECTIONS, THERETOFORE MADE BY THE NORTHERN PACIFIC R. R. C. THE DECISION OF THE

SECRETARY OF THE INTERIOR DATED AUGUST 27, 1886, (23 L. D. 204), FIXING THE EASTERN TERMINUS OF THE NORTHERN PACIFIC R. R. CO. AT DULUTH, AND THE ORDER OF MARCH 22, 1897, CANCELLING THE SELECTIONS OF LAND LYING EAST OF DULUTH.

It will be noticed that prior to the decision of the Secretary dated August 27, 1896, fixing the eastern terminus of the grant to the Northern Pacific R. R. Co. at Duluth, the land department by its order of July 9, 1896, held for cancellation, the preliminary selections of said company to all lands lying east of Duluth. That after the decision of August 27, 1896, was made, and on March 22, 1897, another order was made finally cancelling said selections. It would therefore appear that there were two questions involved in these orders, and decision: First, the order cancelling the selections, and 2d the decision of the Secretary as to the eastern terminus of said railroad. The 1st was a question of fact, the 2d may be considered a question of law and fact. The land in controversy is within the second indemnity limits of the grant to the Northern Pacific Railroad Company. The authority to select the same must be found in the Joint Resolution of Congress dated May 31, 1870. That resolution declares that the company, "shall be entitled under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter as will make up such deficiency. The selection of said land by said company was merely preliminary. There was no approval by the land department prior to the filing of Campbell's statement. The Secretary not only by his order cancelled these selections, but restored the land

to the public domain, and declared them subject to disposal in the same manner as other public lands. This order was not revoked until after Campbell had applied for the land. There was nothing said about the cancellation by the Secretary of these selections either in the case of Doherty v. Northern Pacific R. Co. 177 U. S. (1. ed.) 830, or in United States v. Northern Pacific R. Co. 177 U. S. (1. ed.) 836. Those cases simply decided that the eastern terminus of the Northern Pacific Railroad Co. was at Ashland, Wis., instead of Duluth, Minn. The Secretary of the Interior was simply in error as to that question—but it did not follow that because he erred in judgment as to that question the order of cancellation was also void. That was a matter in which he alone had jurisdiction. It was exclusively within his control. The Northern Pacific Railroad Company could obtain indemnity only through the Secretary of the Interior, for the resolution provides that the company shall receive under the direction of the Secretary, so many sections as will make up such deficiency. The cancellation of the selections was within the scope of the authority of the Secretary and on questions of this kind his decision is generally conclusive everywhere, even in a court of justice, nor can it be reversed or corrected in a collateral proceeding between private parties. The Secretary must pass upon many questions, previous to the approval of selections. His judgment upon these matters is that of a special tribunal, and is unassailable except in direct proceedings for its annulment. When the law has confined to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. The railroad company had no vested right in these selections, the Secretary acted within the scope of his authority—the selections were in fact cancelled, and the

land restored to the public domain. Whether the cancellation was right or wrong it was beyond the power of collateral attack, in a controversy between private parties.

The Northern Pacific Railroad Co. claim to have made its selection of this land October 17, 1883, more than 23 years ago. There is no valid reason why, if said railroad company was entitled to this land, it should not have been awarded to it years ago. It is in evidence in this case that on a sale of the lands granted in aid of the construction of this road, to enforce the payment of the several mortgages given by said Northern Pacific Railroad Co. to the Farmers' Loan & Trust Co., that 38,000,000 acres were disposed of to the Northern Pacific Railway Co. Why is it that the legal title to this enormous quantity of land is still held by the government, that this land grant has not before this been adjusted, and the lands to which the company should have a title passed to it, and it required to bear its equal proportion of taxes, as land owned by private individuals. It is well known that no patents are issued to said railroad without its requests and experience has shown that the holder of unproductive real estate is poor, and the more he owns the poorer he is. One thus situated will use his best endeavors to dispose of the same shifting this burden on the shoulders of others, but as long as the government will hold these lands in trust for the railroad; and thus the company escapes the burdens that would arise from the ownership of the same, just so long will the title be allowed to remain in that condition, awaiting the increased value from the labor of others, and the settlement of the country.

The remarks of the court in St. Paul, etc., R. R. Co. v. Winona R. R. Co., 112 U. S. (1. ed.) 872-876 are appropriate here:

> "Was there a vested right in this company, during all this time, to have, not only these lands but all the other odd sections within the twenty mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market and withdrawn from taxation and forbidden to cultivation?"

THE NORTHERN PACIFIC RAILWAY COMPANY IS NOT THE SUCCESSOR OF THE NORTHERN PACIFIC RAILROAD COMPANY.

There is no evidence in this case that the Northern Pacific Railway Company, is the successor of the Northern Pacific Railroad Company. That is a fact to be established by evidence, not assumed to exist by reason of the assertion of the fact by the Northern Pacific Railway Company. The act of July 2, 1864, incorporating the Northern Pacific Railroad Company, was in the nature of an agreement, wherein the United States was one of the parties, and the Northern Pacific Railroad Company was the other. This agreement could not be changed or modified in any material respect without the consent of both parties. The grant to that company of 50,000,000 acres of the public domain, to aid in its construction, was

on compliance with certain conditions on the part of the railroad company. The United States was not only interested in having this road constructed, but it was concerned in many other ways, for the performance of which, on the part of the railroad company, it reserved to itself the right at any time to add to, alter, amend, or repeal this act. That is expressed in Sec. 20 of said act, which reads as follows:

> "That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefit of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this Act."

The interest of the United States in this road was not to end on the completion of the same, there was no limit to the time when the rights of the government should cease; it was to continue as long as "grass grows, and water runs." It can not be said that the interest of the government in this road was ended, when the stock and bondholders of this road deemed it to their interest to change the terms and conditions of the original charter, without the consent of Congress.

After the completion of this railroad in 1887, a scheme for its sale was advocated. An agreement having been made with certain of its bondholders, and the Great Northern Railroad Co. required that the mortgages given by the Northern Pacific Railroad Company, to the Farmers' Loan and Trust Co. should be foreclosed. It also contemplated placing the road in the hands of receivers. The action of the receivers caused trouble

with its employes, which was designed to depreciate the value of the property of said road. To more perfectly carry out this scheme, it became necessary to ressurect the defunct Superior & St. Croix R. R. Co. and breathe into it the breath of life. This was done by the Legislature of Wisconsin April 15, 1895. This railroad was not only to purchase the personal property but also the land granted to the Northern Pacific Railroad Company, and after such purchase, these bondholders were to issue the bonds of this new road, in the amount, and for the purpose stated in the agreement between them and the Great Northern Railroad Co. Such agreement is referred to in the case of Pearsall v. Great Northern Railroad Co., 161 U. S. (l. ed.) 838. The decision in that case, (which was rendered March 30, 1896), upset this scheme, and another one was devised. On April 8, 1896, only six days after that decision Senator Mitchell of Oregon, introduced in the Senate the following joint resolution:

> "To facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling parallel or competing railroad; which was read the first and second time by unanimous consent and referred to the committee on the judiciary."

On April 21, 1896, the committee on the judiciary, reported the joint resolution with amendments, and submitted a report, a part of which reads as follows:

"The purpose of this proposed legislation may be stated in a few words. It has been made to appear to your committee that the land grant and other property of the Northern Pacific Railroad Company, all of which is covered by mortgage liens, will at a very early date be sold under foreclosure proceedings. This joint resolution, should it become a law, will enable the purchaser, at such foreclosure sale, upon filing in the office of the Secretary of the Interior a copy of the deed or deeds conveying to them said property, together with a certificate signed by a majority of them, setting forth the name adopted by them, the names, number, and residence, respectively, of the directors of the proposed new company, and a copy of any plan of reorganization adopted by said purchasers, or pursuant to which such purchase shall have been made, to reorganize under the name specified in such certificate, so that they, their associates, successors, and assigns shall have and be invested with all the estate, right, title and interest of such purchasers, in and to such railroad and property, and shall possess franchise, rights, and powers, the same as the Northern Pacific Railroad Company now possesses; such new company to be subject to all the obligations and duties imposed by Congress upon the Northern Pacific Railroad Company. * * * The resolution also provides that nothing in it contained shall be construed as making any additional grant of lands to such successor corporation, or as a waiver of any right of the United States now existing to enforce any forfeiture of lands heretofore granted to the said Northern Pacific Railroad Company, or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore grant-

ed to the Northern Pacific Railroad Co. or any purchaser or purchasers of such lands from said company. The right to alter, amend, or repeal this resolution is also by express terms reserved to congress."

On January 23, 1897, the joint resolution came before the senate for action, objection being made to its consideration, the joint resolution was not acted upon, nothing further was done by Congress.

On July 1, 1896, the corporate name of the Superior & St. Croix Railroad Co. was changed to "Northern Pacific Railway Co." which name was adopted as the corporate name of the Superior & St. Croix Railroad Co.

These proceedings in the senate abundantly show that those interested in this scheme to dispose of the property and effects of the Northern Pacific Railroad Company, realized that thy must in some way obtain the consent of Congress, before they could legally take action, when, however, that consent could not be had, they proceeded on the theory that title to this property would pass without the assent of Congress. The change in he name of the Superior & St. Croix Railroad Company to that of the Northern Pacific Railway Co., and the purchase of the property, real and personal, of the Northern Pacific Railroad Company, had, they believed, the effect to create that company the successor of the Northern Pacific Railroad Company whether Congress was disposed to consent to the change or not.

If the Northern Pacific Railway Company is the successor of the Northern Pacific Railroad Company, then that company must be the predecessor of the Northern Pacific Railway Company. This we know is not the fact, the Northern Pacific Railroad Company exists today. Congress could add to, alter, amend or repeal the act of

1864, if it should repeal it, the lands granted to the company and still undisposed of would return to the public domain. With such authority still existing, which we all must admit, how can the Northern Pacific Railway Company be the successor of a living corporation.

The defendants rely upon a decision of the Secretary of the Interior (29 L. D. 316) in a case of the Northern Pacific Ry. Co., under the act of July 1, 1898, which holds that upon the examination of copies of certain deeds, it is found that the Northern Pacific Railway Co. is the successor of the Northern Pacific Railroad Co. and that finding the defendants claim is conclusive; that the Secretary found from this evidnce that the Northern Pacific Railway Company was the successor of the Northern Pacific Railroad Co. is no more astonishing than the assertion on the part of the defendants that such finding is conclusive. The law which the Secretary was in that case construing, has an express provision with reference to this matter of succession. It was a legal question, not a matter of fact that had to be decided. The act of July 1, 1898, provides:

> "That nothing herein contained shall be construed as intended, or having the effect, to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company, in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company, in the courts of the United States, BUT THE LEGAL QUESTION whether the said Northern Pacific Railway Co. is such lawful successor of the said Northern Pacific Railroad Company, should be the question raised, shall be determined wholly without reference to the provisions of this act."

We raise the question of successorship here, are we bound by the decision of the Secretary, as contended by the defendants the proposition is absurd.

The Northern Pacific Railway Co., in compliance with th laws of Wisconsin, under which it was organized, made its first report to the Railroad Commissioner of that state for 10 months ending June 30, 1897. This report was sworn to by the President and Treasurer of said company, as bein a complete and correct statement, the same was filed in the office of said commissioner, a copy of which is in evidence in this case.

To certain questions asked, the following answers were given:

1st.—Name of common carrier making this report? Answer—Northern Pacific Railway Company.

2d.—Date of organization? Answer—1870.

3d.—Under laws of what Government, State or Territory organized? If more than one, name all; give reference to each statute, and all amendments thereof? Answer—Wisconsin; special act approved March 15, 1870; amended January 20, 1871, March 6, 1871, and April 15, 1895; former title Superior & St. Croix Railroad Company, changed to present name by resolution of stockholders and directors in July, 1896.

4th.—If a consolidated company, name the constituent companies? Give reference to charter of each and all amendments of same? Answer—Not a consolidated company.

Without the power conferred by the Joint Resolution of May 31, 1870, the Northern Pacific Railroad Company, wauid have had no authority to issue its bonds and secure the payment of the same by a mortgage "on its

property and rights of property of all descriptions, real, personal, and mixed, including its franchise as a corporation." Did those words confer power to convey to its bondholders by way of mortgage, and on foreclosure to transfer to the purchaser an absolute title to all the property of the company, also its franchises, including the franchise of becoming and being a corporation, so that the purchaser would have the right to organize as such successor to and substitute for the Northern Pacific Railroad Company, precisely as if the act of July 2, 1864, had named them as corporators, and endowed them with corporate faculty. If so, it would involve an assumption of the Northern Pacific Railroad Company's obligations as well as an acquisition of its privileges and exemptions. The franchise of being a corporation can not be transferred by any corporate body of its own will, as it is not a subject of sale and transfer.

In the case of Memphis, etc., R. R. Co. v. Berry, 112 U. S. (l. ed.) 840, in which questions of similar character arose, the court said:

> "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquired the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficiial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators; while the power and privileges, vested in and to be exercised

by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises. If, in the present instance, we suppose that a mortgage and sale of the charter of the railroad company created a new corporation, what has become of the old one? If it abides for the purpose of responding to the obligations not satisfied by the sale, or of owning property not covered by the mortgage or embraced in the sale, as it may well do, and as it must if such debts or property exist, then there will be two corporations co-existing under the same charter. For after an act of disposition which separates the franchise to maintain a railroad and make profit from its use, from the franchise of being a corporation, though a judgment of dissolution may be authorized, yet, until there be such judgment the rights of the corporators and of third persons may require that the corporation be considered as still existing."

The corporation created by the act of July 2, 1864, has never been dissolved and, for all purposes not covered by the mortgage, still maintains an existence as a corporate body, capable of contracting, and of suing and being sued. If this be so, how can the Northern Pacific Railway Company be its successor.

The powers of corporations organized under legislative statutes, are such and such only as those statutes confer. The charter is the measure of its powers, and the enumeration of these powers implies the exclusion of all others. In the construction of such a statute every presumption is against it.

Referring again to Sec. 10 of the act of July 2, 1864, we find this provision, "No mortgage or construction bonds, shall ever be issued by said company on said road; nor mortgage, or lien made in any way, except by the consent of the Congress of the United States." In the Joint Resolution of May 31, 1870, authorized the company to "issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage."

The prohibition with respect to "liens made in any way" was still retained. Congress never consented that liens other than mortgage liens should ever be placed upon the property. In Thomas v. West Jersey R. R. Co., 101 U. S. (1. ed.) 950, the court declared the general principle on this subject to be:

> "That where a corporation like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, WITHOUT THE CONSENT OF THE STATE, to transfer to others the rights and powers conferred by the charter, and relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

In York v. Winans, 58 U. S. (1. ed.) 27, in reply to the argument made by the appellant, that the duties imposed upon it by the charter, are fulfilled by the construction of the road, and that by the alienation of its rights to use, and its powers to control and supervise it, they would avoid further responsibility, the court said:

"But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation can not absolve itself from the performance of its obligations WITHOUT THE CONSENT OF THE LEGISLATURE."

It is not claimed that Congress ever gave its consent that the lands within the Northern Pacific Railroad Company's grant lying east of the Missouri River, might be sold to satisfy liens by way of judgments against the company. To hold that such sale can be made without the consent of Congress, and by such sale pass a legal title to the purchaser, is to hold that any act done without authority, makes all its parts valid and the more it is done when forbidden by law the stronger the claim to its enforcements in the courts.

It may be well to note in passing, that the plaintiff claims, that the power to mortgage conferred upon the the company by the Joint Resolution, was exhausted when the first mortgage was given, which was in 1870, when the work of construction was begun. This mortgage was paid. The road was built through Minnesota long before the other mortgages were given, and therefore could not have been executed to secure the payment of bonds issued for the construction and equipment of that portion of the road. Although the lands east of the Missouri River were not affected by or sold on the

foreclosure of any mortgage, the order of sequestration prohibited the Northern Pacific Railroad Company "from issuing any mortgage or construction bonds on said road, or lien made in any way, except by the consent of the Congress of the United States."

On May 31, 1870, congress passed a joint resolution, which provided among other things:

> "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and description real, personal, and mixed, including its franchise as a corporation. * * * And if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity, or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof to the highest and best bidder."

The land in controversy was not affected by a sale under any mortgage but on an order of sequestration. The joint resolution had only reference to a mortgage, the consent of Congress required to be given by Section 10 of the act of July 2, 1864, referred only to a mortgage, but not to "liens made in any way" by the company upon its property. Congress had a right to make this condition, and the acceptance of this provision by the Northern Pacific Railroad Co. made it effective and

binding upon it. This land was sold on a lien created by the court, without the consent of Congress, and the sale of the land did not affect the title to the same. This land was within the second indemnity limits and at the date of the pretended sale the title to the same was in the United States. The order of sale attempts to carry out the mode and manner of sale as if the lands had been patented to the Northern Pacific Railroad Company, or had been selected by that company and the selections approved by the Secretary of the Interior, but when it came to the sale of lands the selection of which had not been approved, the sale was made in gross, not by sections or sub-divisions of sections. It was simply the sale of lands, the legal and equitable title of which was then in the United States. No title could pass to such lands, whatever their situation might be in the future. There was an entire want of authority to dispose of these lands in the manner in which they were sold, and therefore no title passed by such sale. The purpose of this provision in Sec. 19 of the act of July 2, 1864, was at all times to keep the granted lands free from liens for the benefit of the stockholders of the company, and place the land grant beyond the reach of those that might at times have charge of its affairs, and be inclined to exploit the same for their own selfish interest. If the grant was beyond the reach of those that were connected with the management of the Northern Pacific Railroad Co., if the company were prohibited from creating a legal liability in the shape of a lien, it is not clear how such a lien could be made effective by an order of the court in a suit in which neither the United States, nor the stockholders of the company were parties. This provision is the same as if Congress had stated that the land embraced in this grant were exempt from sale under execution or decree. The United States as well as the stock-

holders are directly interested in the enforcement of this provision.

On April 27, 1899, there was a decree of the court made and entered in the cause in which the Farmers' Loan & Trust Company were complainant and the Northern Pacific Railroad Company and others were defendants, (Record page 145), in which the prayer of the petitioners being granted it was ordered that all the lands granted by Congress to aid in the construction and equipment of the Northern Pacific Railroad Company, and all the rights of said defendant under the several land grants made to it by Congress in any lands lying within the State of Minnesota, should be sold, the lands to be sold were the lands for which letters patent have been issued to the said Northern Pacific Railroad Company and the right to receive lands for which patents have not issued but which have been selected by and certified to said company these should be sold in single sections or subdivisions.

This decree was vacated by a decree May 25, 1899, (Record page 149), and on that date another decree was made and entered, insofar as the manner and mode of selling these lands were considered it was in the same manner as the decree of April 27, 1899 The special master who disposed of this land under the decree of the court dated May 25, 1899, made his report of his doings (Record page 159) and the manner and mode in which the sale was made, and refers to A. 2, which appears in the record of the case (Record page 163) which the special master states the lands sold in schedule A 2, were offered for sale and sold in single sections or subdivisions thereof. On September 16, 1899, it appearing to the court from the report of the special master "that he had fully complied with the directions in said decree as to the sale of said lands," the sale was confirmed.

April 27, 1899. Decree, Record p. 216):

> "All of said lands for which letters patent have been issued to said defendant, the Northern Pacific Railroad Company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, shall be sold in single sections or subdivisions thereof at the following places."

May 25, 1898, record 223, another decree was entered upon which the sale of this property was made, states the manner in which this property was to be sold.

The order is the same as in the decree of April 27, 1899.

August 24, 1899, record 233-237, report of special master to the court, on page 237 of the record he says, speaking of the lands sold in St. Louis County:

> "Then and there, pursuant to said decrees offered at public sale the lands described in Schedule A2 hereunto annexed and made a part hereof, except those represented by "item number 390" in said schedule which said offers of said lands were in single sections or subdivisions thereof as represented by each item number.

It is claimed by the complainant that the sale of this land under the decree of the court was void.

It appears in evidence from the report of the special master that his authority to dispose of this land was conferred upon him by a decree of the court, which required the special master to sell these lands at public auction, and what lands were to be sold and the manner in which they should be sold was specifically mentioned in said decree.

He was to offer for sale:

1st. All of the said lands for which letters patent have issued to said defendant, Northern Pacific Railroad Company.

2d. And the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company.

These two classes of land were to be sold in single sections or subdivisions.

This was the authority conferred upon the special master and the validity of his sale depended upon his conforming thereto.

The only lands that he was authorized to sell, which was included in these two classes, were lands that had been patented to the Northern Pacific Railroad, and lands that had been selected by said company, and its selections had been approved by the Secretary of the Interior.

He was not authorized to sell any lands that were not thus situated.

He was, however, authorized to sell all other lands in which the Northern Pacific Railroad Company claimed an interest, which would embrace lands not included within the two classes of land above referred to and that have not been patented to the railroad company, or its selections had not been approved and certified to the company.

All lands thus situated were to be placed in a separate class and sold in a different manner, to-wit, in a lump.

The sale of these lands was made, according to the report of the special master, on the 17th day of July 1899, and his report to the court of his proceeding under said decree, and his manner of executing the same, was made Aug. 24, 1899. In said report he says:

"That I attended at the time and place of sale within said County of St. Louis, specified in said notice, to-wit, on the 17th day of July, 1899, at 4 o'clock p. m., at the Court House in Duluth, St. Louis County, in said State of Minnesota, and then and there, pursuant to said decree, offered at public sale the lands described in Schedule A2, hereunto annexed and made a part hereof, excepting those represented by 'Item number' 390, in said schedule, which said offer of said lands were in single sections or subdivisions thereof as represented by said 'Item number' in said schedule except said number 390."

As the report does not describe the lands sold, but refers to Schedule A2, that schedule or what is claimed by the defendants to be a copy is offered in evidence and made defendants Exhibit 10, (record pp. 163-175) from which it appears that this land in controversy is therein designated as "Item number 151" (Record 168), and was sold as land that had either been patented to the Northern Pacific Railroad Company, or selected by and certified to said company.

This land did not belong to either of these two classes, and for that reason the special master had no authority to sell the same under the decree.

From this it would appear that this land was not of the character that the special master was authorized to sell in the manner which he did do, the decree conferred upon him his only authority, he had no right to dispose of this land otherwise.

As said in Williamson v. Berry, 8 Howard (1. ed.) 1171:

"In any sale under a decree or order in chancery, the purchaser, before he pays his money must

> not only satisfy himself that the title to the property is good, but he must take care that the sale has been made according to the decree or order. If he takes under an imperfect sale, he must abide the consequences."

In Milwaukee & Minnesota R. R. Co. v. Soutter, 69 U. S. (1. ed.) 886-898, Mr. Justice Miller speaking for the Court said:

> It is too clear for argument that a sale by the marshal unauthorized by the decree, is without validity. Does the order confirming the sale make it valid? Upon principle, the question is by no means free from difficulty, we are clear that a sale without a decree to sustain it would be a nullity, and we doubt if the court can make it valid by a mere general order of confirmation."

In Gray v. Brignardello, 68 U. S. (1. ed.) 693-698, the court said:

> "Purchasers at a judicial sale are protected. when the power to make the sale is expressly given, not otherwise. It is only when they buy on the faith of an order of the court which clearly authorizes the act to be done, that the shield of the law is thrown around them. An officer of the court may erroneously suppose that the power to sell is given by a decree; yet, if he does sell, his act is without authority of law and is void."

When a decree specifies the manner in which it must be exercised, it must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its

exercise. There can not in this case be any presumptions indulged in to sustain the action of the special master and uphold this sale, for he recites in his report the manner in which he sold the property, and from the recitals it appears that he disregarded the order or decree of the court and did not conform to its directions. That presumptions are not indulged to sustain proceedings of this character are made manifest. Presumptions are indulged to supply the place of that which is not apparent, not to give a new character to that which is seen to be defective, every deed executed under a power must refer to the power. As an independent instrument of the holder of the power it would not convey the interest intended, but if the manner in which the power is exercised is recited, it being proper matter for recital, then the recital is evidence not against a stranger, but against the grantee and parties claiming under him. French v. Edward 20 U. S. (1. ed.) 702.

The special master recited in his report the manner in which he had exercised the power conferred upon him by the order or decree, making part of his report schedule A2, and referring to the lands he had sold by items, mentioned in said schedule, among which we find the land in controversy; the Northern Pacific Railway Company, by accepting the conveyance with this solemn declaration of the officer as to the manner in which his power was exercised, would be estopped from denying that the fact was as recited.

If while acting under a valid decree, an officer sells lands not embraced therein, his act is, as to such lands, obviously without any legal support.

Ludlow v. Park, 4 Ohio 5.

Green v. Holt, 76 Mo. 677.

In conducting the sale, the master acts as the agent of the law, his powers as such being derived from the decree, and the order or decree must be strictly pursued. The purchaser is bound by the presumption to know the limits of the master's authority as delegated to him by the decree, and purchasing when he transgressed such special authority, he does so at his peril. This is in accordance with the general principles applicable to the law of agency.

Manifestly when the decree requires that the master make the sale under the order of the court he is imperatively controlled by the requirements thereof, and a sale made in controvention of the decree is ineffectual to bar the title from the judgment debtor to the ostensible purchaser.

Sec. 310 Klebers void Judicial Sales.

Accordingly, in theory of law in a strictly judicial sale the court itself is properly the vendor, and the sale, insofar as the owner of the property is concerned is an involuntary one. Sec. 2.

From its very nature, a judicial sale is of necessity the result of judicial proceedings, and the order or decree upon which the sale is founded, must expressly direct that the property involved, whether real or personal, be sold, for without such an order there can be no judicial sale within the strict meaning of the term. Sec. 3.

A sheriff, master or other officer, selling property under a process, decree or judgment of the court cannot make a valid agreement with the purchaser to convey any other estate than such as the decree or judgment will warrant.

Ryan v. Dox, 25 Barb. 440.

A sale of land under judgment must be made in the manner prescribed in the judgment.

Bethel v. Bethel, 69 Ky. (6 Brush 65-99).

American Dec. 655.

A sale of property in any other manner than that prescribed by law vests no title in the vendee.

Gable v. Martin, 2 Mass (1 Howard) 558.

But we do not mean to intimate that in any case a sale by master, or master in chancery, can be valid, when there is no decree to support it, citing Shriver v. Lynn, 2 Howard 43.

Milwaukee and Minn. R. R. v. Soutter, 69 U. S. 898.

THE NORTHERN PACIFIC RAILWAY COMPANY, WAS NOT AUTHORIZED BY ITS CHARTER TO PURCHASE, HOLD OR CONVEY THESE LANDS.

The rights of the Northern Pacific Railway Company were conferred upon it by an act of the state of Wisconsin dated March 15, 1870, by which was incorporated the Superior and St. Croix Railroad Company. This act was in effect the same as the one under consideration in the case of Case v. Kelly, 133 U. S. (1. ed.) 513, in which it was held that a railroad had no authority to deal in any lands, except only such as was necessary in the conduct of its business as a railroad. The decision in that case, would be the law in this, provided the

amendments to the articles of incorporation of the Superior & S. Croix Railroad Company, adopted by the Legislature of the State of Wisconsin, April 15, 1895, were void under the constitution of that state, and the complainant was authorized to raise that objection. The act with the amendments are given in full. (See exhibit "D" attached to the bill of complaint.)

It is claimed that Section 8, as amended under which the authority is conferred is void, as controvening not only Section 18 of Article 4, of the constitution of the State of Wisconsin, but of Section 31 of Article 4 of the same instrument.

Section 18, Art. 4, of the constitution, is as follows:

> "No private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title."

The title of the Act was "To incorporate the Superior and St. Croix Railroad Company." The title of the act as amended April 15, 1895, is:

> To amend Chapter 326 of the private and local laws of 1870, entitled "An Act to incorporate the Superior & St. Croix Railroad Company," and Chapter 328, of the private and local laws of 1871, entitled "An Act to incorporate the Superior & St. Croix Railroad Company."

The title was plain and simple, "To incorporate the Superior and St. Croix Railroad Company." Anything that was germane to this title was authorized under it. The original charter of the Superior & St. Croix Railroad Company was for the construction of a railroad entirely within the State of Wisconsin, and it was author-

ized to acquire real estate for its right-of-way and for lands that were necessary for its use as such railroad. By section8 as amended, the company was authoribed to hold and dispose of any lands that the Superior & St. Croix Railroad Company might acquire, by its purchase or otherwise, in any territory, through or in which it shall acquire in any manner, and operate any railroad or railroads wherever such lands may be situated. By this amendment the act has two subjects. First, to incorporate the Superior & St. Croix Railroad Company; Second, to buy, sell, or otherwise dispose of, lands within any state through which it may operate any railroad. These two subjects have no connection with each other.

Would we reasonably anticipate finding in the body of an act, the title of which was to incorporate the Superior & St. Croix Railroad Co., a clause giving authority to said corporation to purchase, hold or dispose of lands without limit? Is such a provision germaine to such a title? The construction of a railroad and the purchasing and disposing of lands have no rational connection with each other. The only subject mentioned in the title is the incorporation of the Superior & St. Croix Railroad Company. Such an act might contain any provision necessary to carry out that purpose. An act to incorporate the Superior & St. Croix Railroad Company, would apprise neither the Legislature nor the public, that it covered provisions under which an unlimited amount of lands could be purchased by that corporation. The reading of such a title would at once induce the conclusion that the various provisions of the act related alone to the inporation of said railroad, and the act itself must, therefore be confined to that subject. The constitutional provision is violated if an act is amended so as to embrace a purpose outside of its title. Whatever amendments

are made must be amendments to the organic law, and not independent provisions relating to something else. The constitution has made the title, the index to the legislative intent, as to what shall have operation. The purpose of the adoption of such provision in the constitution of the state was that every measure presented for consideration should stand upon its own merits, and that the legislature should be fairly notified of the design of the act when required to pass upon it. Has the added provision any necessary connnection with the subject stated in the title, or any connection with the subject treated in the act? By no reasonable construction in the purpose of buying and selling lands can be said to be embraced within the title to incorporate the Superior & St. Croix Railroad Company. The section of the constitution prohibiting legislation of this character is a wise and wholesome one, intended to prevent legislators from being entrapped into a careless passage of sections and clauses in bills of which the title gives no intimation. The propriety of such an inhibition is apparent to all, and it must be observed and protected by the courts. Titles to legislative acts by reason of these constitutional provisions possess very great importance. It not only requires that the purpose of the law should be correctly indicated, but it absolutely makes the title of the act control, and excludes everything from the effect and operation as law which is incorporated in the body of the act but is not within the purpose indicated by the title.

Is it probable that the Legislature of Wisconsin, having under consideration the amendments to incorporate the Superior & St. Croix Railroad Company, if it had supposed or been informed that by the adoption of said amendments it was clothing said railroad company with the power to deal in lands, not necessary for its

use, that it was conferring upon it a power without limitation, that such provisions would have become a law. The title is not broad but narrow, not general but specific. Under such a title no one would infer, and nobody was bound to imagine that such vast powers had been conferred upon this corporation to deal in lands in the manner claimed by said company, a provision as to which the title not only did not relate, but by its narrow terms affirmatively, and positively excluded.

Milwaukee Co. v. Isenrig, 109 Wis. 19.

Diana Shooting Club v. Lamoreoux, 114, Wis. 44.

Section 31, Article 4 of the constitution of the State of Wisconsin is as follows:

> "The Legislature is prohibited from enacting any special or private laws in the following cases: First, For changing the name of persons, or constituting one person the heir at law of another; Second, For laying out, opening or altering highways, except in cases of state roads extending into more than one county, and military roads, to aid in the construction of which lands may be granted by Congress; Third, For authorizing persons to keep ferries across streams, at points wholly within this state; Fourth, For authorizing the sale or mortgage of real or personal property of minors, or others under disability; Fifth, For locating or changing any county seat; Sixth, For assessment or collection of taxes, or for extending the time for the collection thereof; Seventh, For granting corporate powers or privileges, except to cities; Eighth, For authorizing the apportionment of any part of the school fund; Ninth, For incorporating any town or village, or to amend the charter thereof."

It is contended by the complainant, that under the seventh subdivision of Section 31 the amendments to the charter incorporating the Superior & St. Croix Railroad Company, adopted by the Legislature on April 15, 1895, are void. It can not be denied that these amendments grant corporate power as well as privileges, and that to a very remarkable extent. The original act of March 15, 1870, contained 22 sections. Of these 12 sections were amended, 7 repealed and 6 new sections added. Under the guise of amendments a new act to incorporate this company was made. New powers, and new privileges were conferred upon it, and these of a very extraordinary character. The act under consideration not only authorized and empowered the "Superior & St. Croix Railroad Company" to construct a railroad within the boundary of the state of Wisconsin, but to extend the construction of said railroad into the several states, and into the Dominion of Canada. It could not only build a railroad, but it was authorized to purchase any railroad, or railroads, to buy stock and bonds of any railroad. It may become a dealer in lands, buy and sell the same in the states through which its railroad may pass, and all these powers are conferred upon it, under the act, the title to which is to incorporate the "Superior & St. Croix Railroad Company." That there was no intention by these amendments to carry out the original purpose of the act is apparent by the subsequent action of this company. From March 15, 1870, to July 6, 1896, the Superior & St. Croix Railroad Company, if it had any existence at all, such existence was on paper alone. Not a mile of this road had been constructed, there had been no money raised or effort made towards the construction of this road. The incorporation of the Superior & St. Croix Railroad Company up to July 6, 1896, was only a float, and its only market value was the use it was

put to on that date by changing its name to the Northern Pacific Railway Company, and within six months after this transformation, it was the owner of more than 5,000 miles of tract, and millions of acres of land, with stock and bonds issued by it of more than $300,000,000 without a mile of the road constructed on the line designated in the original act, and all this vast property held under an act to incorporate the Superior & St. Croix Railroad Company. It seems to me that if the amendments to this act adopted April 15, 1895, conferred the powers and privileges clearly fall within the condemnation of the Seventh clause of Sec. 31, Art. 4, of the Constitution of the State of Wisconsin, and are therefore void.

In the case of Attorney General v. Superior & St. Croix Railroad Company, 93 Wis. 613, the court in speaking of the amendments to the Articles of Incorporation of this company, said:

> "Whether the provisions of Ch. 244, Laws of 1895, which greatly enlarge the existing rights, privileges and franchises of the company, and confer upon it others of a varied and most comprehensive and highly important character, are void, as being in violation of the 7th clause of the constitutional amendment of 1871, (Art. 4, Sec. 31), forbidding the enactment of "any special or private laws for granting corporate powers or privileges, except to cities," is not presented by the information, so as to become a proper subject for judicial determination and we neither express nor intimate any opinion in respect to these portions of the act."

The matter before the court was a motion by the Attorney General for leave to file an information in the nature of a quo warranto, the court, however, was of the opinion that so far as the question presented, that the

amendments were in conflict with the provision of the constitution referred to, the evidence did not show that the company had acted upon them, but in the case now before the court, those facts are made to appear, by the purchase of the land in controversy by this company and the sale of the same to the defendants in this case. If the act as amended authorized the Northern Pacific Railway Company to purchase and dispose of lands acquired, it still remains simply a law of the State of Wisconsin. It has no force or effect in the State of Minnesota.

A corporation is not a citizen (only in a qualified sense) of the state in which it is created. It can only act in another state on such conditions as the latter state may see fit to impose. Corporate existence is by universal law regarded as a franchise which can never exist except by positive authority within the state which granted or confirmed its franchise. The strictly legal existence by force of obligatory law of a corporation is confined to the state which created it, and endowed it with its powers, capacities and rights, which it can only exercise in another state by the permission of the legislative power thereof, and when it assumes to act in such state, the enjoyment, and exercise of such right must conform to the law or settled policy of that state not prejudicedial to its interest, or those of its citizens. The power to take land in a corporate capacity is itself a franchise, the title passes by succession, the changes by death or otherwise among the corporators does not affect its disposition, as it does in private holdings.

The question whether a railroad company organized under the laws of Wisconsin is competent to take title to lands in the State of Minnesota, does not wholly depend upon the laws of its creation; the laws and public policy of the State of Minnesota, as indicated by its legislature,

are material, and important factors to be considered. The Northern Pacific Railway Company owes its existence to the laws of the State of Wisconsin, and the powers and capacities expressed or implied, are such as conferred upon it by its charter. The question therefore is, First, Whether the Northern Pacific Railway Company was clothed with authority to purchase these lands within the State of Minnesota, and, if so, Second, whether the laws or settled policy of Minnesota allowed such purchase. The laws of the State of Minnesota prohibit corporations from holding lands except to a limited extent, Section 5877, Gen'l Stat. 1894, as amended by Ch. 129, Laws of 1899, provides:

> "That no corporation other than those organized for the construction or operation of railroads, canals or turnpikes, shall acquire, hold or own over 5,000 acres of land so hereafter acquired in this state; and no railroad, canal or turnpike corporation shall hereafter acquire, hold or own land so hereafter acquired in this state other than may be necessary for the proper operation of its railroad, canal or turnpike, except such lands as may have been granted to it by act of Congress, or the Legislature of this state."

This statute indicates the policy of the state in this regard. Whatever may have been the capacity of the Northern Pacific Railway Company to take, hold and convey lands within the State of Wisconsin, the laws of Minnesota forbid that company, and all other corporations, to take, hold or convey lands in the State of Minnesota, except such as may be necessary for the proper operation of its road. The complainant, therefore, contends that the title to this land in controversy did not pass to the Northern Pacific Railway Company, and that

such road could not transfer any valid title to the same to the defendants.

It may be urged that the limitation upon the power of a corporation to receive land is one which concerns the state alone, that the title to such lands in a corporation can only be defeated by a proceeding in the nature of a quo warranto on behalf of the state.

The rule universally applied in determining the effect of conveyances is, that if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee. A patent is but evidence of the grant, and the officer who issues it acts ministerially, and not judicially; if he had no authority to grant it, or another party had a higher equity, and should have received the patent courts in a proper action will pronounce it void. A court might hesitate to declare the title to land already received and in the possession of the defendant void, for the reason that their grantors had no authority to purchase such land, and were forbidden to do so by their charter, but if the title conveyed to their grantor was absolutely void, for want of authority to grant it, or their grantor to receive it, the title would be held void even in a court of law.

In reference to the patenting of these lands to the Northern Pacific Railway Company, the question is not that of "ultra viras," but of the power and authority of the government to convey, and the railroad company to receive. I contend that there was wanting in this case both a grantor and a grantee. Where the officer has no authority in law to grant, such grant is void, for a public officer can bind the government only within the scope of his lawful authority. (U. S. v. Stone, 69 U. S. 765). If the officer has authority to grant but the grantee has no

authority to receive, the grant is void for the same reason. It is not a question of "ultra vires" for that can only occur where the grantee has exceeded its powers, but here is an entire want of power to receive the grant. In such cases the grant is held absoluately void, not voidable.

The existence of a grantee authorized to take the grant is absolutely essential to every grant, and the grant to a fictitious person or corporation is a mere nullity, and can in no manner affect the title of the lands purporting to be granted.

Thomas vs. Wyatt, 31 Mo. 188;

Douthett vs. Stinson, 63 Mo. 268;

U. S. vs. S. C. C. & T. Co., 18 Fed. Rep. 273-276;

Russell vs. Topping, 5 McLean, 194-202;

Harriman vs. Loutham, 10 Ind. 190;

Devlin on Deeds, Sec. 191.

It is settled that where it is doubtful whether a corporation has exceeded its powers or abused its corporate franchise in the acquisition of title to land, strangers cannot litigate the question, at least after the title has vested. The question then is one between the state and the corporation.

But while this is true, it is equally well settled that where the acquisition is prohibited, a grant to such corporation would be absolutely void and would not pass the title.

Russell vs. Topping, 5 McLean, 194;

Harriman vs. Southam, 16 Ind. 190;

Chatauqua County Bank vs. Risley, 14 Denio, 480;

Michigan Bank vs. Niles, 1 Doug. 401;

People vs. Bank of Oakland Co., 4 Denio 280.

The question presented is not one of doubt as to whether or not it has exceeded its powers or abused its corporate franchise.

It is not therefore to be governed by those decisions where the question of the right of the corporation to take lands is a question of doubt which the corporation has a right to have passed upon by the Courts.

THE CASE OF SJOLI v. DRESCHEL.

The Northern Pacific Railroad Co. has no vested right until after the approval of the Secretary. It has only the right of selection and having no other right is bound to exercise that right with reasonable diligence. In Sjoli vs. Dreschel, 199 U. S. (L. E.), 564 The Court said:

> "No right to lands within Indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior, that up to the time such approval is given lands within indemnity limits although embraced by the Company's list of selections are

subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and that the Secretary has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road. * * * The result of the cases in this court is that the railroad company did not acquire an interest in any particular lands within the indemnity limits merely by filing its lists of selection, nor until its selections were approved by the Secretary of the Interior, * * * The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the pre-emption or homestead laws. On the contrary, notwithstanding the filing of such lists they remained open, as before, to settlement or occupancy under those laws, until the selections were formerly approved by the Secretary of the Interior, and the lands withdrawn from settlement or sale.."

In the case of Ryan v. Central Pacific R. R. Co., 99 U. S. 305 (1. ed.) Mr. Justice Swayne, speaking for the court, says:

> With respect to the lieu lands, as they are called, the right (of selections) was only a float, and attached to no specific tract until the selection was actually made in the maner prescribed by law.

What did the law prescribe? That the selections should be approved by the Secretary of the Interior, until that time the right to select was only a float, that might be settled on any land within the indemnity limits. This was the only construction which would preserve a wise control in the government over the public lands and

prevent spoliation of them under the pretense of selection. The railroad company being under no obligation to finally take the land it had by its preliminary selection selected but it could at any time before such selection was approved relinquish its preliminary selection and take other land; an other reason why the land must be identified, and it could not be identified until the tract was known, and selection made and approved.

In St. Paul & Sioux City R. R. Co. v. Winona, etc., 112 U. S. 872-876. (1. ed.) Mr. Justice Miller speaking for the court says:

> Until a valid selection by the grantee is made from the lands within the indemnity limits, they are entirely open to disposition by the United States, or to appropriation under the laws of the United States for the disposition of the public lands.

In Wisconsin Central R. R. Co. v. Price County, 133 U. S. 687-694, (1. ed.) Mr. Justice Field, speaking for the court says:

> Until selections were approved *there were no selections in fact*, only preliminary proceedings taken for that purpose; and the indemnity lands remained uneffected in their title, until then the land which might be taken as indemnity, were incapable of identification; the proposed selections, (that is the list) remains the property of the United States.

In New Orleans R. R. Co. v. Parker, 143 U. S. 66, (1. ed.) Mr. Justice Brown, speaking for the court, says:

> As to lands within the indemnity limits, *it has always been held* that no title is acquired until the specific parcels have been selected by the grantee, *and approved* by the Secretary of the Interior.

In Humbird v. Avery, 195 U. S. 286-298, (1. ed.) Mr. Justice Harlan in speaking for the court said:

> That no title to indemnity lands is vested until a selection is made by which they are definitely ascertained, and the selection made *approved by the Secretary of the Interior.* This principle, (says the court) is firmly established.

If the railroad company by its preliminary selection of this land, October 17, 1883, (27 years ago) had a right to the same. If at any time thereafter the government, if so disposed, could have conveyed the land or reserved the same; if the railroad company could at any time during these 27 years have relinquished its claim, and selected other land, what interest could the railroad company have had in land thus situated. The proposition that it was within the authority of any officer of the land department, having no regard to what had taken place between 1883 and the present time, by his approval of the selection made by the railroad company in 1883 to clothe such selection in such a manner as to make a valid title that would relate back to the date of the filing of the preliminary selection and cut off intervening claims, is too absurd to notice.

The only question to be determined is at what time did the railroad company obtain any right whatever, by its selection of this land; was it at the date of filing of its preliminary selection, or at the time of the approval of such selections by the Secretary of the Interior. It must be one or the other for no claim is made by the railroad company that its right to this land accrued at any other period.

That question I think was answered by the court in Sjoli v. Dreschel, 199 U. S. 311 (1. ed.). The facts in that case were as follows: Sjoli entered upon the land

with his family, October 4, 1884, and since that time continuously resided thereon. The land was within the first indemnity limits of the grant to the Northern Pacific Railroad Company. The map of the general route of said railroad was filed in the office of the Commissioner of the General Land office Aug. 13, 1870, (See map in brief. p. 102), the line of general route, and the subsequent map of definite location filed Dec. 26, 1871, were coterminous; at the same time the Commissioner withdrew the odd numbered sections within the first and second indemnity limits of the grant. At the date of the filing of the maps of the general route and definite location of the road, and the withdrawal of land within the first and second indemnity from sale or other disposition, the land was public land subject to selection by the railroad company. At the time Sjoli took possession of the land the United States land office was established and had been doing business for many years prior to that time, but Sjoli made no application for the land as the law required, (Maddox v. Burnham, 156 U. S. 1. ed. 527), the law is firmly settled that one whose claim to public land depends on possession alone has no title to the same, without regard to the length of time he may have been in possession, or the value of improvements he may have placed thereon, in order to make his possession of any effect he must apply to enter the land, under one of the land laws of the United States, I do not think there can be any question about this proposition. While Sjoli was in possession of the land the Northern Pacific Railroad Company in 1885, made and filed its list of selections which included the land occupied by Sjoli. In 1889, five years after his taking possession of the land and four years after it had been selected by the railroad company, Sjoli applied to make entry of this land under the homestead law. His application was rejected because the

local officers erroneously supposed the land to be within the granted limits of the St. Paul, Minneapolis & Manitoba Railroad grant. No appeal was taken from that order. He continued to reside on the land and in 1895, again applied at the proper land office to enter the land under the homestead law. At that time he had been in occupation of said land 11 years with no other title to the same except his possession. His application to enter was allowed, his proof accepted and on June 18, 1901, a patent for the land was issued to him. Can the defendant explain, under their theory of selection in connection with the facts above stated, why the court adjudged the title to this land in Sjoli. He had not applied to enter the land, until after the company had filed its list of selections, his possession of the land at the time of the selection, gave him no title, if the theory of the defendants is correct, that by the selection of this land in 1885, it gave to the company a right to this land, what became of such right. If it had a right, legal or equitable, at the date of the preliminary selection in 1885, that right must exist today. I think it plain from the decision of the Sjoli case that the supreme court has declared that the date of the approval of the selection by the Secretary of the Interior, is the date when the land is selected, and not at any date prior to that time. This I contend is determined and clearly expressed in the following paragraph of the opinion of the court.

> That no rights to land within indemnity limits will attach in favor of the railroad company until after selection made by it with the approval of the Secretary of the Interior. That up to the time such approval is given, lands within indemnity limits, *although embraced by the company's* list of selection are subject to be disposed of by the United States, or to be settled upon and occupied under the

> pre-emption and homestead laws of the United States, and that the Secretary of the Interior *has no authority to withdraw from such sale or settlement lands that are within indemnity limits which have not been previously selected with his approval,* to supply deficiencies within the place limits of the company's road.

This language is broad and comprehensive. The court says that "no right to lands within the indemnity limits will attach in favor of the railroad company until after selection made by it with the approval of the Secretary of the Interior," this is a statement without any qualification. You can not say that one has no right to land, but if some time in the future he does acquire a right, that that right will date back 25 years, and cut off all intervening claims. The decision in the Sjoli case shows conclusively that the right of the railroad company to any selected lands must date from the approval of the Secretary, and not a day before such approval.

And this would be so if the preliminary selection list of the company had remained since the date of filing, October 17, 1883, undisturbed and not canceled. The last paragraph of the opinion of Mr. Justice Harlan in the Sjoli case, puts beyond question the equitable title to this land. in which the court said:

> The learned state court in not holding, (that is that the approval of the selections by the Secretary was the date of the company's selection) and adjudging that the Northern Pacific Railway Company acquired an interest in the land immediately upon filing its list of selections and that the defendant in error (that is Dreschler) was the owner of it.

Further in the case at bar, the question is not that of divesting from a corporation a vested title, but whether or not any title ever vested in the corporation.

In conclusion we ask the careful consideration of the court to the following propositions:

1st. That the Northern Pacific Railroad Company, under the proviso in Sec. 3 of the Act of July 2, 1864, was not entitled to any lands that were included within the Act of May 5, 1864, such act being prior in date to the Northern Pacific Railroad Company, and should be deducted from the amount of lands granted to said Northern Pacific Railroad Company, and charged to the same.

2d. If such should be determined by the court not to be the law, we then insist that after the definite location of the Lake Superior & Mississippi Railroad, who was the beneficiary of the grant of May 5,1864, the lands within the place and indemnity limits of the Lake Superior & Mississippi Railroad, would by relation, be considered from the date of the grant May 5, 1864, this would be prior to the date of the Northern Pacific Railroad Company's grant, and if the land claimed to have been lost by reason of its being patented for the benefit of the Lake Superior & Mississippi Railroad Company, the lieu land should have been selected within the first indemnity limits, a selection of land within the second indemnity limits should not be sustained.

3d. The land within the place limits of the Northern Pacific Railroad Company, claimed to have been lost to its grant, which was the bases of the selection of the land in controversy was on the south side of the railroad

line, while the land selected was on the north side of its line of road, such selection is void.

4th. The decree under which this land was sold dated May 25, 1899, particularly directed the manner in which the lands should be sold, to-wit: Record page 150).

> "All of the said lands for which letters patent have been issued to said defendant Northern Pacific Railroad Company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, shall be sold in single sections, or sub-divisions thereof."

The land in controversy was not in either of these classes. It was neither patented to the Northern Pacific Railroad Co., nor selected by that company, and approved by the Secretary, for the records show, (Record p. 138) that the approval of the selection of this land was not until Oct. 12, 1905. There was no authority given by this decree ,to the special master to sell this land in the manner he did, and therefore no title to the same passed to the Northern Pacific Railway Company by reason of such sale.

5. The land in controversy was not included in the bill filed October 18, 1893, to foreclose the mortgage given by the Northern Pacific Railroad Company to the Farmers' Loan & Trust Company, nor in any of the subsequent mortgages given by that company. The bill filed August 15, 1896, was dismissed November 15, 1893, so far as it had any effect in the State of Minnesota, and which is the bases of these proceedings, gave the court no authority to make a decree for the sale of these lands for the court was without any jurisdiction.

6th. That the selection of this land as indemnity for the loss of the land within the place limits of the grant to the Northern Pacific Railroad was void, for the reason that the lieu lands was not the nearest unappropriated land to the land lost. This fact should have been shown by the Northern Pacific Railroad Co.

7th. The act of July 2, 1864, incorporating the Northern Pacific Railroad Company, did not intend to confer this grant on any other corporation hereafter to be organized, there is no evidence in the case that the Northern Pacific Railroad Company, or of any other company. The land department was without any authority to convey this land to the Northern Pacific Railway Company, neither had the Northern Pacific Railway Company under its charter any authority to receive such conveyance.

8th. The act of July 2, 1864, conferred no authority upon the Northern Pacific Railroad Company to execute a mortgage upon the lands granted, but on the contrary expressly prohibited the making of a mortgage. The joint resolution of May 31, 1870, gave consent that a mortgage might be given but that was a charter power and when once exercised it was exhausted, the subsequent mortgages given after the mortgage dated July 1, 1870, are all without authority and are illegal and void.

MEMORANDUM OF AGREEMENT, Made this sixteenth day of March. 1896, by and between

J. P. MORGAN & CO, of New York, and the DEUTSCHE BANK, of Berlin (hereinafter called the "Syndicate Managers"), of the first part; and

J. P. MORGAN & CO., as Reorganization Managers of the Northern Pacific Railroad Company (herein called the "Reorganization Managers"), of the second part; and

THE SYNDICATE SUBSCRIBERS hereto (hereinafter called the "Syndicate"), constituting the party of the third part; every such Syndicate Subscriber being bound only ratably and to the extent of his own subscription, and not for any other subscriber or subscription.

WHEREAS (pursuant to a Plan about to be issued), it is proposed to undertake a reorganization of the affairs of the Northern Pacific Railroad System on the basis of a Prior Lien Four per cent. mortgage and a General Three per cent. mortgage, involving about $6,500,000 annual fixed charges for all outstanding bonds (not including sinking-fund charges nor interest on bonds reserved for additional construction requirements. ets.), and with $75,000,000 Four per cent. non-cumulative preferred stock and $80,000,000 common stock, it being understood that new Prior Lien bonds equal at least to the par of any undisturbed existing main-line bonds are to be reserved for the ultimate redemption thereof;

AND, WHEREAS, it is proposed that to the extent and in the manner hereinafter provided the Syndicate shall provide the cash requirements of said Plan;

NOW, THEREWORE, THIS AGREEMENT WITNESSETH: That, in consideration of the mutual promises herein contain and the expected benefits from the performance thereof:

1. The Syndicate will take and pay for, and the Managers will sell and deliver, the following new securities when issued:

$7,775,000 of the new 4 per cent. Prior Lien Mortgage Bonds

1,172,880 of the new 3 per cent. General Mortgage Bonds

18,767,825 of the new Preferred Stock (Trustees' Certificates)

77,500,000 of the new Common Stock (Trustees' Certificates)

For the sum of $19,873,830 in cash, plus any interest accrued on the bonds when delivered.

2. The Syndicate, if so requested by the Reorganization Managers,will further take and pay for the following additional amounts of new securities when issued:

$3,554,960 of the new 4 per cent. Prior Lien Mortgage Bonds

$9,718,120 of the new 3 per cent. General Mortgage Bonds.

For the sum of $8,875,000 in cash, plus any interest accrued on the bonds when delivered;

or, if and as requested by the Reorganization Managers, the Syndicate will so take and pay for any part of both or either of such lots of bonds; the ratable price therefor to be fixed by the Syndicate Managers and the Reorganization Managers.

The Reorganization Managers agree to sell to the Syndicate said additional lots of bonds, if, and as the proceeds thereof shall be, required by said Managers for the purposes of the reorganization, or such part thereof as may be so required, as above provided.

3. If at any time, for purposes in their opinion calculated to promote the reorganization, the Reorganization Managers shall desire the Syndicate (a) to advance moneys upon security of certificates approved by the Syndicate Managers entitling their holders to new securities when issued, or (b) to advance moneys upon other security approved by such Syndicate Managers including coupons, lands or land notes), or (c) to purchase lands or land notes, the Syndicate Managers, will make such loans at six per cent. per annum interest, and will make such purchases up to an aggregate amount of loans and purchases not exceeding $15,000,000; but such loans upon lands or land notes or such purchases thereof shall not exceed $3,500,000 in amount. All loans hereunder shall be repaid out of the proceeds of the new securities deliverable hereunder.

4. It is distinctly understood and agreed, anything herein to the contrary notwithstanding, that the total obligations of the Syndicate under this agreement shall not exceed the sum of forty-five million dollars ($45,000,000) in cash.

5. Deliveries of new securities shall be made with reasonable promptness after completion of re-organization, in New York, London and Berlin, in such proportions as the Syndicate Managers respectively shall request. The Syndicate will perform all its undertakings hereunder from time to time on the call of the Syndicate Managers. The compensation of six and two-thirds per cent., hereinafter provided for is to be paid when and as securities are delivered, and regardless of the aggregate amount of securities delivered.

6. Not over $9,000,000 (20 per cent.) in money shall be called from the Syndicate hereunder in any one month. Payments from the Syndicate Subscribers shall be due only after ten days' written notice from the Syndicate Managers to the Syndicate Subscribers.

7. The Syndicate hereby authorizes the Reorganiza-Managers, in and by the proposed plan, to offer, for account of the Syndicate, to depositing holders of the preferred stock of the Northern Pacific Company, at $10 per share, preferred stock of the New Company to the amount of 176,192 shares and common stock of the New Company to hte amount of 176,192 shares, and offer to the depositing holders of the common stock of the Northern Pacific Company, at $15 per share, common stock of the New Company to the amount of 490,000 shares, upon the terms and in the manner provided in said plan and agreement, and the Reorganization Managers hereby agree to make such offer. All moneys paid by the depositing holders of preferred or common stock of the Northern Pacific Railroad Company under said plan and agreement shall be credited on account of the amount payable by the Syndicate under Article 1. hereof, and may be used by the Reorganization Managers for any purpose of the reorganization.

8. The Reorganization Managers shall pay to the Syndicate Managers for the benefit of the Several Syndicate Subscriber in proportion to their respective subscriptions, a commission or compensation of six and two-thrds per cent. in cash on the amount of the subscriptions hereunder regardless of the amount which the Syndicate shall be called upon to pay or advance.

9. The Plan of reorganization may be modified from time to time by the Reorganization Managers, and thereupon this agreement shall apply to such modified plan; but any amendment which the Syndicate Managers shall deem seriously to impair the value of the new securities shall have their joint written approval. The Reorganization Managers may finally abandon the Plan, including all modifications thereof, and in such event this agreement shall cease to be of any future effect, and no compensation thereunder shall be due the Syndicate.

10. The Reorganization Managers shall have and from time to time may exercise all powers as stated in the reorganization, agreement and plan, including the right, in their discretion, to fix, limit or extend the time within which any bondholder may deposit bonds, or any stockholder may purchase stock, and to waive any forfeiture in respect thereof.

11. Failure of any Syndicate Subscriber to perform any of his undertakings herunder shall not release any other Syndicate Subscriber, except with the written consent of the Syndicate Managers. The Syndicate Managers may accept new Syndicate Subscribers from time to time in place of any Subscriber released by them, or who shall fail to perform his undertakings hereunder.

12. The Syndicate Managers, in behalf of the Syndicate, may make any and all arrangements necessary or expedient to carry out the purposes of this agreement substantially as herein set forth; or to promote or protect what they deem to be the best interests of the Syndicate.

13. The Syndicate Managers may decide whether the bonds and stock, or either, deliverable hereunder

(except such stock as shall have been sold to depositing stockholders of the old Company) shall or shall not for a period not exceeding one year after delivery be held subject to the Syndicate Managers' control, i. e., "syndicated", for the purpose of sale by them for the ratable benefit of Syndicate Subscribers; and the Syndicate Managers may take all proper steps and adopt all reasonable precautions to carry such decision into effect. In case the bonds and stock be so "syndicated," the Syndicat Managers may sell the same, or any part thereof, for the benefit of the Syndicate, charging a commission of one per cent, on the proceeds thereof, in addition to all expenses by them incurred, and they may require each Syndicate Subscriber to supply his ratable share of the bonds or stock so sold (which each Syndicate Subscriber, for himself, agrees to do), receiving his ratable share of net proceeds of such sales.

14. The Syndicate Managers shall not be liable under any of the provisions of this agreement, or any matter connected therewith, and in like manner the Reorganization Managers shall not be liable under any of the provisions of this agreement or any matter connected therewith, except in each instance for good faith and th exercise of reasonable diligence. The Syndicate Managers may become Syndicate Subscribers hereto, and in that event they shall be liable for their Syndicate subscriptions in the same way as, and ratably with, other Syndicate Subscribers.

15. All notices to American members of the Syndicate shall be sufficient if signed by or for J. P. Morgan & Co. for the Syndicate Managers, and to other members if signed by or for the Deutsche Bank in like manner.

16. Each and every party hereto, upon reasonable request, will, from time to time, execute, deliver and perform all further written agreements necessary or proper to carry this agreement into effect.

17. This agreement shall bind and benefit not only all the parties herto, but their respective executors, administrators, survivors, successors and assigns.

The respective Syndicate Subscribers, on signing this agreement, shall set opposite their respective names the amount of their respective subscriptions on account of the whole Syndicate obligation hereunder; and each Subscriber shall be liable only for such ratable part of the whole obligation of the Syndicate as shall bear the same ratio to such whole obligation as the amount of his subscription bears to $45,000,000.

Nothing herein contained, or otherwise, shall constitute the Syndicate Subscribers partners, or render them liable to contribute more than such ratable amounts as aforesaid.

IN WITNESS WHEREOF, the parties hereto, being the Syndicate Managers, the Reorganization Managers and the Syndicate Subscribers, have at various dates affixed their subscriptions hereto, it being understood that, for convenience, this agreement may be signed in several parts and copies with like force and effect as if all of the signatures were put to one part or copy thereof.

I am aware that no arguments can be drawn from the wisdom that comes after the fact, but it appears to me that it would have been much more profitable to the government if it had kept the title to these lands and not

vested them in the company. If aid was deemed advisable, give such aid out of the proceeds arising from the sale of the lands, or loan to the railroad company a certain amount either of money or bonds. Land should never be allowed to be vested to any great extent, either in the hands of private parties or in those of a corporation, because it is a peculiar kind of property not only in its necessity to man, but in the power it gives to men over their fellow beings. It is peculiar also in this, that of all kinds of property known to men, it is the only one which the wit of man cannot add to, let him contrive or toil as he will. He can make land more productive, and in that way he can increase its aggregate value, but in all the surface of the globe he cannot add one foot of earth to that which lays in the beams of the morning sun that first shone upon Adam in Paradise. Money can be replaced—land cannot be increased. Land alone is that kind of property which is essential to the maintenance of that class of freeholders in this country without which there can be no true prosperity or content. In this country the presence of such a class and in great numbers is essential to the development of our national strength and greatness and to the efficient working and permanent existence of our free institutions.

H. H. HOYT,
Counsel and Solicitor for Complainant.

Nov. 17, 1909.

FILED
MAR 30 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 162.

CHARLES D. CAMPBELL, Appellant,

vs.

JOHN A. HUMBIRD & FREDERICK WEYERHAUSER, Appellee.

Brief of Charles D. Campbell, Appellant.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

M. H. STANFORD,
Of Counsel for Appellant.

1910
MERRITT & HECTOR, PRINTERS,
DULUTH.

Supreme Court of the United States

October Term, A. D. 1909.

No. 176.

CHARLES D. CAMPBELL, Appellant,

vs.

JOHN A. HUMBIRD & FREDERICK WEYERHAUSER, Respondents.

BRIEF OF M. H. STANFORD IN BEHALF OF APPELLANT.

This action involves the title to 160 acres of land situated in St. Louis County, Minnesota. The controversy had its origin in conflicting orders or rulings in the land department of the United States as to what was the eastern terminus of the Northern Pacific Railroad Company.

A statement of the case appears in the Brief of H. H. Hoyt, commencing at page 53.

The appellant, Campbell, claims the right over all others to purchase the land in controversy under Act of Congress of June 3, 1878, known as the Timber and Stone Act.

The Appellees, Humbird & Weyerhauser, claim title under and by virtue of a conveyance from the Northern Pacific Railway Company, which company claims to be the successor to the Northern Pacific Railroad Company,

and the basis of appellees' title is the land grant to the Northern Pacific Railroad Company by Act of Congress of July 3, 1864, and the joint resolution of Congress of May 31, 1870, and the preliminary selection of the land by list filed in the land office October 17, 1883, which selection was for the purpose of indemnifying the railroad company for losses in its place limits. This selection list specified losses in bulk.

Aprl 11, 1893, the Railroad Company, acting under the direction of the Secretary of the Interior, re-arranged the selection list so as to specify a particular tract lost as the basis for each selection, and in the re-arranged list there was set opposite the tract in controversy, the Southeast quarter (SE¼) of Section nineteen (19), Township one hundred and thirty-three (133), North of Range thirty-four (34) West, West of Duluth. The land claimed to be lost is situated on the South side of the line of the Northern Pacific Railroad Company in the western portion of the State, while the land involved in this action is situated on the North side of the line of the Northern Pacific Railroad Company, East of Duluth, and is known and described as the Southeast quarter of Section twenty-one, Township fifty-four, North Range Twelve West of the Fourth Prinicpal Meridian, within the Duluth land district of Minnesota.

The Railroad Company took no steps to claim or identify this land as a part of its indemnity until October 17, 1883, as before mentioned, when it filed its first list under said joint resolution, dated May 31, 1870, and thereafter the revised list filed on the 11th day of April, 1893. This selection was not approved by the Secretary of teh Interio. until November 7, 1905, and the land was patented to the Northern Pacific Railroad Company November 13, 1905.

ARGUMENT.

It will be noted that on November 9, 1896, and December 7, 1897, the date of the two last applications of the

plaintiff, the land in controversy had been restored to, and was a part of the public domain.

Campbell was prevented from acquiring title to the land by reason of the prior claim to the same by the Northern Pacific Railway Company, under its selections, and except for this claim based on said selection Campbell might have proceeded to perfect his title to the land.

The United States never has asserted any claim to the land, other than it belongs to the public domain.

Campbell claims that his rights are protected by Act of July 1, 1898, portions of which Act appear in Brief of Mr. Hoyt, at pages 76 and 72, and in the Brief of Mr. Bunn, commencing at page 40 and extending to page 43, but if the land is not covered by that Act, Campbell claims to have a preferential right of purchase, which right was ignored by the land department, and which he believes the court will protect.

The United States Circuit Court of Appeals in affirming the decree of the lower court in this case, held that the beneficiaries of the Act of July 1, 1898, are purchasers directly from the United States or occupants of and qualified settlers upon the lands therein described prior to January first, 1898, under some law of the United States or some ruling of the Interior Department and that Campbell did not come within the Act.

The appellees contend in their Brief that the purpose of the Act of July 1, 1898, was to furnish a means of adjustment of the controversy between the Northern Pacific and the settlers within its grant.

The construction placed on the Act of July 1, 1898, by the Court of Appeals and that for which the defendant in error contends, appears not only unreasonable but also unjust to a large number of claimants who without the aid of the Act might have perfected their title and excluded from its benefits a large portion of the claims which Congress undoubtedly had in mind at the time of its adoption.

The cardinal rule of construction is to ascertain and effectuate the legislative intent, and for this purpose where the language of the statute is in any manner ambiguous or the meaning doubtful, resort may be had to the surruonding circumstances, the history of the times and the defect or mischief which the statute was intended to remedy.

United States vs. Northern Pac. R. Co., 91 U. S. 72-79 (23 Law. 224-228);

Humbird vs. Avery, 195 U. S. 480 (49 Law. 295);

Platt vs. Pac. Ry. Co., 99 U. S. 48-64 (25 Law. 425-429);

Smith vs. Townsend, 148 U. S. 498 (37 Law. 535);

Lake Superior Ship Canal Ry. & I. Co. vs. Cunningham, 155 U. S. 354 (39 Law. 183);

Funk vs. St. Paul City Ry. Co., 61 Minn. 439.

In this connection I call attention to certain conditions relating to the indemnity lands of the Northern Pacific Railway which existed at the time of the passage of the Act of July 1, 1898. The bill was introduced after the denial by the department of an application of the Northern Pacific Railroad Company (December 13, 1897; 25 L. D. 501), for the suspension from entry and patent the remaining undisposed lands in the odd numbered sections within that part of the formerly recognized limits of the grant to said company lying east of the terminus established by the department, decision of August 26, 1896.

The order of February 28, 1898 (26 L. D. 265) was passed on the petition of the Northern Pacific Railway Company dated January 20, 1898, for a re-consideration of the decision of December 13, 1897, about referred to.

It also appears that the United States, September 3, 1897 (26 L. D. 265), had commenced action against the

Northern Pacific Railroad Company in the Circuit Court of the United States for the District of Minnesota, to secure a judicial determination by the courts as to the eastern terminus of said road.

The Dougherty case in the lower courts of Wisconsin had passed against the claim of said railroad company. A large number of suit had been instituted by the Northern Pacific Railroad Company in Minnesota, North Dakota, Montana and Washington.

The land department was confident as to the correctness of its decision, that the eastern terminus of the Northern Pacific Railroad Company was at Duluth and it resisted all efforts of the company in its desire for suspension of entry of these lands. Prior to this the lands had been restored to the public domain; the lands were applied for by persons duly qualified some of the lands passed to patent, others were purchased prior to January 1, 1898, while a large quantity of the lands unfit for cultivation, but valuable for timber were applied for under the timber and stone law, and by reason of contests and other conflicting claims the applications were not acted upon prior to the order of suspension of February 28, 1898.

Under these conditions this law was enacted, having for its purpose and object the quieting of disputes respecting the title to lands within the Northern Pacific Land Grant and protecting settlers and other claimants under the public land laws from the claims and suits of the company, as well as to protect the company itself against loss from its grant.

Said Justice Harlan, in Humbird vs. Avery, cited:

"Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers

—both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the land department and it became the duty of the government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was therefore, as the circuit court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands would become vexatious, extending over many years and causing great embarrassment.

In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned—the government, the railroad grantee, and indivual claimants. The railroad company evinced its approval of this action of the legislative department by a prompt acceptance of the act in its entirety. By such unqualified acceptance the railroad company agreed that, so far as it had any claim to the lands in dispute, whatever the act of Congress required to be done, might be done."

Said Justice Lochran, in the same case, in his opinion filed in the Circuit Court, 110 Federal Reporter 463:

"The obvious purpose of this act was to provide a certain speedy and equitable way in which all controversies between the railroad grantee or its successors, and purchasers or settlers upon odd numbered sections within the place or indemnity limits of the land grant who claimed by color of any law of the United States or any ruling of the land department should be settled and adjusted without contest or litigation, either in the land department or in the courts. The Railroad Company, by its express acceptance of the act, became bound by its provisions, and obliged to carry out its terms."

Under the circumstances then existing, is there reason for the narrow construction placed on this Act by the United States Circuit Court of Appeals in this case? On the contrary would it not be a natural and reasonable construction to give effect to the words of the Act "*And provided further that all qualified settlers, their heirs or as-*

signs, who prior to January 1, 1898, *purchased or settled upon or claimed in good faith under color of title or claim of right under any law of the United States or any ruling of the Interior Department any part of an odd numbered section* neither the granted or indemnity limits of the land granted to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached."

I quote from Sutherland on Statutory Construction, Section 346:

> "Statutes are seldom written in such precise and categorical terms as to point out inclusively and exclusively all their intended applications. General and more or less flexible language is used. It is construed with reference to the subject of the act, its purpose; and popular words are read and understood according to their common acceptation."

Section 347:

> "Strict construction is not a precise but a relative expression. It varies in degree of strictness according to the character of the law under construction."

Section 348:

> "The rule of strict construction is not violated by permitting the words of a statute to have their full meaning. The letter of remedial statutes may be extended to include cases clealy within the mischief they were intended to remedy, unless such construction does violence to the language used."

Judge Sutherland seems to have expressed in the foregoing quoted matter the spirit which has controlled this court in the consideration and construction of statutes in the various cases with which I am familiar.

The situation of the Northern Pacific Railroad Company and the various adverse claimants to the land at the time of the passage of the Act of July 1, 1898, was similar to that of the parties in Lake Superior Ship Canal Railway & Iron Company vs. Cunningham heretofore cited. In that case under Act of Congress of March 2, 1889, there was declared forfeited to United States certain of the lands grant-

ed to the State of Michigan by Act of Congress in 1856 in aid of a railroad, and by the same Act, that is March 2, 1889, the title to the Canal Company as to certain lands selected and certified with the approval of the Secretary of Interior in satisfaction of a subsequent canal grant was confirmed, except lands on which there was bona fide pre-emption or homestead claims on May 1, 1888, about 10 months previous to the passage of the Act which were also confirmed.

Lake Superior Ship Canal Railway & Iro. Co.
vs. Cunningham, 155 U. S. 354 (39 L. 189).

At the time of the passage of the Act of March 2, 1889, the Court held that neither the plaintiff nor the defendant had any right or title to the tract in controversy; that it was only by virtue of the Act of Congress in question that their respective titles were acquired.

Said this Court, construing the Act of March 2, 1889:

> "The second and third sections are the troublesome parts of the Act and it must be conceded that the true construction is not altogether obvious, and yet, when the situation as it existed and as it was then known to congress is considered, the meaning can be satisfactorily discerned."

This Court, after stating the various classes of claimants to the land and the circumstances under which their respective claims arose, said:

> "Congress under the circumstances with a view of securing an equitable adjustment of these conflicting claims enacted the second and third sections of the Act."

Without quoting further from the Act this court held that notwithstanding the words of the statute,

> "If the consideration received is still retained by the government the title of the lands thus * * * shall be and is hereby confirmed."

That the Act applied to homestead as well as to pre-emption claimants, notwithstanding the proviso relating to the consideration.

The Court also held that notwithstanding the defendant did not apply at the land office to enter his land until after the first day of May, 1888, he having previous to that date been in actual occupation of the land, his title was by the Act confirmed.

The Act of July 1st, 1898, when you consider the circumstances under which it was enacted and the purposes sought to be accomplished indicate what was in the mind of Congress when the bill was passed.

Its purpose was the settlement of disputes. In the language of Justice Harland, in Humbird vs. Avery:

> "If the disputes were not accommodated the litigation would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the Act of 1898, which opened the way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned, the government, the railroad grantees and individual claimants."

The law of 1898 is not like that of any of the land laws. It was passed for a particular purpose and when we recall that purpose it is difficult to believe that Congress intended to confine its benefits to purchasers and settlers. The words "claim" and "claimant" appear frequently in this Act, and the words are used as distinct and separate from "purchaser" or "settler."

The United States never has asserted any claim to the land other than it belongs to the public domain. Campbell was prevented from acquiring title to the land by reason of the prior claim to the same by the Northern Pacific Railroad Company and by the decision of the officers of the land department. Is there any legal or equitable reason in the light of the circumstances which existed when the Act of 1898 was passed for excluding parties from the benefit of the Act whose claims were initiated in good faith and only were prevented from perfecting their title by the actoin of the land department, and but for the claim of the railroad company.

It is a well established rule of this Court that where an individual in the prosecution of a right has done that which the law requires him to do, and he has failed to attain his right by the misconduct, mistake or neglect of a public officer the law will protect him.

Lytle vs. State of Arkansas, 9 How. 333, (13 Law. 160);

Duluth & Iron Range Railroad Company vs. Roy, 173 U. S. 587, (43 Law. 820).

The Railway Company and the defendants in this action now call for a narrow construction of the Act; they ask that it be confined to settlers upon the public land. Their attitude is different than at the time the terms of the Act were accepted by the Company. Shortly after it had accepted the terms of the Act the Railroad Company and the defendants in this action were for a wide open construction, but this their broad construction precluded every one from the benefits of the Act except the railroad itself and its grantees. Soon after the passage of the Act the Railway Company by conveyance to the plaintiffs in this action assumed to pass such interest as it had in nearly if not all of its selected lieu lands lying East of Duluth, with the effect, as claimed by the defendant and the Railroad Company to withdraw or exempt all of the lands so conveyed from the operations of the Act.

The Circuit Court and the Supreme Court of the United States held that this could not be done but the company, still claiming everything in sight, conveyed certain of its lands to various parties, among which was 40 acres deeded to Chas. Dreschel. This land had been occupied by Sjoli since 1884, claiming it under the homestead law. Sjoli did not acquire his patent until June 1, 1901, the Railroad Company having contested his claim through the land office. Notwithstanding that Sjoli had acquired his patent the company claimed a vested interest in the land by reason of its selection for lieu land filed in 1883. This court, however, held that the Railroad Company had no vested inter-

est in the land notwithstanding its selections until such selections had been approved by the Secretary of the Interior. As a matter of fact, which is of common notoriety, this Railroad Company and the defendants in this case by contests in the various departments of the office of the Secretary of the Interior and in the courts had striven to wear out all claimants to lands in its selected list, no matter how just or equitabel may have been their claim, and notwithstanding the well established rule of this court that the company acquired no vested interests in lieu lands until its selections were approved by the Secretary of the Interior.

The United States Circu't Court of Appeals in this case affirmed the decree of the lower court which dismissed the bill for want of equity and held (P. 113, Vol. 88 U. S. C. C. A.) as follows:

> "In this case Campbell was refused permission to purchase the lands he seeks. He never entered or paid for it. His right to buy was never recognized by the United States, and he was never in privity with it. One who has never by acceptance of a grant, or by settlement and improvement, or by occupation or by entry or by payment placed himself in privity with the United States in title before a patent issues to another, may not maintain a bill in equity to charge the title under the patent with a trust in his favor."

As to this proposition I beg leave to refer to the undisputed facts in the case.

It is admitted in paragraph second of the answer of the defendant, at page 69 of the record, that on the 26th day of October, 1895, Charles B. Campbell applied to the United States District Land Office at Duluth to purchase the land in question, under the provisions of the Act of Congress of June 3, 1878. That he tendered his written statement as alleged with the proper and legal fees to the register and receiver of said Land Office, and demanded of them to receive and file his application to purchase, and issue notice in accordance with law, and that such applica-

tion was refused by the said Land Office for the reason that it conflicted with the selection filed by the Northern Pacific Company. That said Campbell appealed, and the decision was rendered upon his appeal substantially as alleged in the bill.

It appears in the bill and was established by proof that Campbell renewed his application twice thereafter, with the same result as on his first application, and in each of the subsequent applications appealed, and the decision on each appeal was the same.

In the same paragraph of the answer defendant admits that a patent for the land ii question was thereafter issued by the United States, and alleged that it was duly executed on the 13th day of November, 1905. The defendant admits that at the time and before the issuance of said patent to the Northern Pacific Railway Company the patentee had knowledge and notice of the claim of the plaintiff.

This, and further admissions in the answer of the allegations of the bill, clearly establish the fact that Campbell in the prosecutions of his attempt to perfect his title under the Act of 1878, has done all that which the law requires him to do, and it was by reason of the action of the officers of the land department and their disregard of the law that he failed to attain his right.

The fact was established by the undisputed evidence in the case that Campbell was in every way qualified to enter the land under the Timber and Stone Act and except for the wrongful action of the land department would have perfected his title.

The above quoted portion of the opinion by the United States Circuit Court of Appeals in this case is contrary to the rule established by this court in the case of Duluth & Iron Range Railroad Company, plaintiff in error, vs. JoJseph Roy, defendant in error, 173 U. S. 587 (43 Lawyers 820). The only difference in the two cases is that

Roy was a homestead claimant and Campbell a claimant under the Timber and Stone Act.

The Roy case was an action to determine adverse claims to real estate and Roy had performed or tendered performance of all acts necessary under the homestead laws to complete his title and it was held:

> "That one who being qualified, settled upon public lands with a bona fide intention of acquiring the same, and when the plat of the survey of the township was filed, went to the land office to enter the land under the homstead laws, and on the denial of his offer instituted a contest which was pending in the general land office when the patent was issued to another by inadvertence and mistake, is entitled to relief against the title claimed under such patent."

I will quote in part the opinion in the Roy case, which includes the facts as follows:

> "The lands were patented to the State of Minnesota by the United States, as swamp and overflowed lands, and the plaintiff in error is the grantee of the State. The defendant in error claims under the homestead laws. At the time of the passage of the Act of 1860, under which the patent was issued, the lands were not swamp, wet, or overflowed, or unfit for cultivation, but were and now are, high, dry and fit for cultivation, except four or five acres in the northwest corner. In May, 1883, the defendant in error, then being qualified to do so, settled upon the lands with the bona fide intention of acquiring the same under the laws of the United States, established his residence thereon and ever since continued to be in the actual, exclusive, and notorious possession, making his home there, and cultivating and improving the same. When defendant in error commenced his residence on the lands the plat of the survey of the township, in which they were located, had not been filed subsequently, and after it was filed, to-wit, on the 2nd of July, 1883, he went to the land office with the intention of entering the lands under the homestead laws, and made a request to do so, but the land officers informed him that there was a mistake in the survey, and that in all probability a new survey would be or-

dered; that numerous protests had been made against the survey which were sufficient to raise the question of its accuracy; that it was unnecessary for him to protest or file on the land, and advised him to wait until such protests were determined.

He was a foreigner, did not know the English language, nor was he familiar with the laws, rules and regulations relating to the disposition of the public lands, and relied upon the representations of the officers and acted upon their advice.

On the 5th of August, 1884, he discovered that the state was claiming the lands as swamp lands, thereupon he duly made application to enter the same under the homestead laws, and tendered the fees to the local land officer. No adverse claim other than that of the state had arisen or was made to said lands, but his offer of entry was rejected on the ground that the same had inured to the state under the act of March 12, 1860, and that his application to enter the lands had not been made within three months after the filing of the township plat in the land office.

On the 6th of August, 1884, he duly filed contest, duly appealed from the rejection of his claim, which appeal and the affidavits attached were transmitted to the commissioner of the General Land Office, and were by him received and filed September 1, 1884.

On the 23rd of January, 1885, and while the appeal and contest were pending, the lands, through mistake and inadvertence, were patented to the State of Minnesota. The defendants took conveyance of the lands with notice of the right, claim and interest of the plaintiff, defendant in error.

The assignments of error attack the conclusions of the state courts as erroneous, and specify as reasons * * * . (c) The defendant in error is not the real party in interest and never had the legal or equitable title to the land, the United States being the only party which could attack the patent to the State of Minnesota, or invoke the action of the courts to determine its validity."

Justice McKenna, speaking for the Court at page 590 (P. 822 Lawyers), said:

"It is now too well established to need argument to support or a citation of authorities, that when a

patent is obtained from the United States by fraud, mistake, or imposition, the question thence arising becomes one of private right, and the courts in a proper proceeding and in execution of justice will devest or control the title thereby acquired, either by compelling a conveyance to the plaintiff or by quieting his title as against the defendants, and enjoining them from asserting theirs. Germania Iron Co. v. United States, 165 U. S. 379 (41 Law. 754); Williams v. United States, 138 U. S. 514 (34 Law. 1026). It was decided that this power extends to cases in which the patent was issued by inadvertence and mistake, the grounds relied on in the case at bar.

The plaintiff in error, however, contends that the defendant in error cannot invoke this doctrine because he is not in privity with the United States; that he has not proved or offered to prove to it, or established, or alleged even in this case, the ultimate facts upon which alone his claim could be recognized or its validity established. In other words, that he has not made or has not offered to make final proof.

This contention is attempted to be supported by the principles announced in Bohall v. Dilla, 114 U. S. 47 (29 Law. 61); Sparks v. Pierce, 115 U. S. 408 (29 Law. 428); Lee v. Johnson, 116 U. S. 48 (29 Law. 570). The principles are that to enable one to attack a patent from the government he must show that he himself was entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He must show that by the law properly administered the title should have been awarded to him.

We do not question these principles, but they only mean that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim. It does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness, may not have reached it, and yet justify relief, as in Ard. v. Brandon, 156 U. S. 537 (39 Law. 524); and in Morrison v. Stalnaker, 104 U. S. 213 (26 Law. 741). And because of the well established principle that where an individual in the prosecution of a

right has done that which the law requires him to do, and he has failed to attain his right by the misconduct or neglect of a public officer, the law will protect him. Lytle v. The State of Arkansas, 9 How. 333 (13 Law. 160).

It would be arbitrary to apply the principle to some acts and not to others—might destroy it utterly to require the performance of all. But we are indisposed to extend the argument, because we regard Ard. v. Brandon, as decisive.

But it is urged defendant in error may not be able to make final proof, and that the Land Department, whose jurisdiction is exclusive, may determine the lands not to be swamp or overflowed. That would be contrary to the findings of the court, which show full qualifications in the defendant, and we cannot presume that the Land Department will find against that fact."

It is conceded that Campbell was prevented from acquiriig his title by reason of the prior claim to the same by the Northern Pacific Railroad Company under its selections, and except for this claim Campbell could have perfected his title to the land.

If the complainant Campbell is not protected by the Act of July 1, 1898, we insist that he has a preferential right of purchase, which right was ignored by the Land Department.

It was held in the case of Sjoli vs. Chas. Dreschel, 199 U. S. 564 (50 Law. 311):

"That no interest in lands within the indemnity limits of the land grant to the Northern Pacific Railroad Company made by the Act of July 2, 1864, was acquired by that company by virtue of the filing of its list of selections of such lands to supply deficiency within the place limits but such lands remained open as before to settlement or occupation under the preemption or homestead laws until the selections were formally approved by the Secretary of the Interior."

This is in confirmation of the repeated decisions of this court.

The sole reason why Campbell was not permitted by the Land Department to perfect his title to the land was the alleged prior claim thereto of the Northern Pacific Railway Company. The selection of the land in suit was not approved by the Secretary of the Interior until the 7th day of November, 1905, and the patent therefor was issued six days thereafter. It must be apparent, therefore, that the claim of the Railway Company as against Campbell was void.

Mr. Hoyt in his brief discusses four propositions which I have not mentioned. They are as follows:

1. The lands lying East of Duluth claimed by the appellee are not within the grant of the Railway Company.

2. If they were originally within the grant the selections were cancelled by the order of July 6, 1896 and March 22, 1897.

3. Under the Act of July 2, 1864, the Northern Pacific Railway Company was limited to ten alternate sections of land per mile on each side of its railroad wherever it passed through a state and there was no authority in the grant to issue patents for land to the Railway Company on the north side of its line of road in lieu of lands deficient on the south side of the road, and such patents are void.

4. The Northern Pacific Railway Company is not the successor of the Northern Pacific Railroad Company, and the appellees have failed to prove title to the land in suit.

I endorse each and all of the foregoing propositions, but will not take the time of the court in discussing them here, all of which are,

Respectfully submitted,

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Counsel for Appellant.

Dated, March 22, 1910.